OFFICE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 171

EDDIE V. HANNA, PETITIONER,

vs.

EDWARD M. PLUMER, JR., EXECUTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 10, 1964
CERTIORARI GRANTED OCTOBER 12, 1964

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RELEVANT DOCKET ENTRIES

1963

Feb.	6	Complaint (jury claim) filed
	6	Summons issued
	20	Sums. retd by Marshal, served Feb. 8, 1963 filed
	26	Appearance of Alfred E. LoPresti for deft. Edward M. Plumer, Jr., Ex. of Est. of Louise Plumer Osgood filed
	26	Deft's answer (jury claim) filed
May	6	Appearance of James T. Connolly for deft. filed
Aug.	5	Interr. prop. by dft. to be ans. under oath by pltf., Eddie V. Hanna filed and c/s
	26	Deft motion for Summary Judgment filed
Sept.	30	SWEENEY, Ch.J. Hearing on deft's motion for summary judgment; taken under advisement.
Oct.	2	Pltff's memorandum filed
	17	SWEENEY, CH.J. OPINION. . . . Motion for summary judgment is ALLOWED. Copies to Joseph Scheider, Esq., Virgil F. Mills, Esq., Alfred E. LoPresti, Esq., James T. Connolly, Esq.
Nov.	14	SWEENEY, CH.J. After hearing on deft's. motion for summary judgment and in accordance with the Opinion of the Court handed down on October 17, 1963 allowing said motion, it is ORDERED judgment for the deft. dismissing the pltff's. Complaint, entered. Copies to Joseph Scheider, Esq., Virgil F. Mills, Esq., Alfred LoPresti, Esq., James T. Connolly, Esq.
Dec.	9	Notice of Appeal filed by pltff. cys of N/A to Messrs LoPresti and Connolly.
	9	Bond on Appeal—costs, filed ($250—St. Paul Fire & Marine Ins. Co as surety thereon.
	17	Original pleadings del'd to Ct of Appeals

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 7th day of February 1963, I received this summons and served it together with the complaint hereto as follows thereafter on the 8th day of February 1963, at 4:00 PM I summoned the within defendant, Edward M. Plumer by leaving at his last and usual place of abode, 8 High Rd., Newburyport, in said District in the hands of his wife, Mrs. Edward M. Plumer, a true and attested copy of this Summons together with copy of Complaint.

ROBERT F. MOREY
United States Marshal.

By F. J. OCZKOWSKI
Deputy United States Marshal.

MARSHAL'S FEES
Travel $8.88
Service 3.00

Subscribed and sworn to before me, a this day of 19
[SEAL]

NOTE—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 63-91-S

EDDIE V. HANNA
2029 - 14th Street
Cuyahoga Falls, Ohio
PLAINTIFF

v.

EDWARD M. PLUMER, JR.,
EXECUTOR OF THE ESTATE OF
LOUISE PLUMER OSGOOD, DECEASED,
8 High Road
Newburyport, Massachusetts
DEFENDANT

COMPLAINT
(Jury Trial Requested)

1.) Plaintiff is a citizen of the State of Ohio, and the defendant is a citizen of the Commonwealth of Massachusetts. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000).

2.) Plaintiff says that on or about November 5, 1961, she was a bona fide resident of Fort Lauderdale, County of Broward and State of Florida, and is now, at the time of the filing of this petition, a resident of Cuyahoga Falls, Summit County, Ohio.

3.) Plaintiff further says that on the 5th day of November, 1961, the defendant's decedent, Louise Plumer Osgood, was a bona fide resident of and residing at 225 Water Street, Newburyport, Essex County, Massachusetts.

4.) Defendant is the duly appointed, qualified and acting Executor of the Estate of Louise Plumer Osgood, deceased, and said decedent's Estate is being probated in the Probate

Court of Essex County, in the Commonwealth of Massachusetts.

5.) Plaintiff further says that a Notice of Claim in the amount of this petition was duly filed in the Registry of Probate of Essex County in the Commonwealth of Massachusetts in said Estate and a copy of said claim of the plaintiff was likewise duly given to the defendant Executor of said Estate within the time required by law for the filing of a claim in a decedent's estate.

6.) Plaintiff says that this action herein is brought upon said claim within the time required and in accordance with the procedure of the law of the Commonwealth of Massachusetts in filing suit against the said decedent's Estate.

7.) Plaintiff says that South Carolina State Route, or Highway No. 301 is a duly dedicated highway running in a general northerly and southerly direction through the County of Bamberg in the State of South Carolina, and that it is a two lane highway of blacktop composition of approximately twenty-four (24) feet in width.

8.) Plaintiff further says that on November 5, 1961, at approximately 11:00 A.M. at a point approximately two (2) miles south of the town of Bamberg, South Carolina, the said plaintiff was driving and operating her 1958 two door Chevrolet automobile in a northerly direction, and at said place on said State Route No. 301 a county road adjoined and intersected said highway on the east side of State Route No. 301.

9.) Plaintiff says that at said point, where South Carolina State Route No. 301 and said county road join, a Ford automobile, traveling in a southerly direction, had stopped in the south bound lane of highway travel preparatory to making a left hand turn and waiting for this plaintiff to pass said intersection or juncture.

10.) Plaintiff says that the defendant's decedent, at

said time and place, was driving and operating a four door 1957 Oldsmobile, also in a southerly direction on the south bound or west portion of South Carolina State Route No. 301, at a speed in excess of sixty (60) miles per hour, and as defendant's decedent approached the point on said State Route No. 301 where said Ford automobile, going in the same direction as defendant's decedent, had stopped, the said defendant's decedent failed to slacken her speed or come to a stop to the rear of said Ford automobile, and then did drive and operate her car over onto the north bound lane of said highway and into and against the automobile of the plaintiff, who was proceeding northerly on her, the plaintiff's, own half or portion of said State Route No. 301 at said time and place.

11.) Plaintiff says that said decedent was guilty of negligence by reason of violation of the law of South Carolina governing and regulating traffic on a highway at the time and date of said accident herein described, and that said violation of traffic regulations by defendant's decedent was contrary to the statutes known as The Uniform Act Regulating Traffic on Highways of the State of South Carolina, as set forth in Chapter 46, Sections 211 to 691, inclusive, of the duly enacted and existing laws of the State of South Carolina, which statutes control and govern the rights and the duties of the plaintiff and the defendant's decedent at the time and place involved herein.

12.) Plaintiff says that the defendant's decedent, in driving and operating her automobile into and against the plaintiff's automobile on plaintiff's portion of said highway, caused plaintiff's automobile to be brought to an abrupt stop and in so doing, caused plaintiff's body to be thrown forward and against the steering wheel of her own car and against the hard interior portions thereof, causing plaintiff to sustain serious, painful, permanent and disfiguring injuries to her body and person as hereinafter set forth.

13.) Plaintiff says that the defendant's decedent was negligent in the following respects, to-wit:

a) In driving and operating her said Oldsmobile automobile at said time and place without due regard or care for other persons lawfully using said highway at said time and place,

b) In driving and operating her said Oldsmobile automobile at said time and place without maintaining and keeping said automobile under proper direction and control,

c) In operating her said Oldsmobile automobile at a high and excessive rate of speed, to-wit: in excess of sixty (60) miles per hour in a thirty-five (35) mile an hour zone,

d) In driving and operating her said Oldsmobile automobile without proper brakes or braking devices in operating order, which would enable her to slow down and stop her automobile before striking automobile traffic ahead of her on said highway,

e) In driving and operating her said Oldsmobile automobile from her own portion of the highway over onto plaintiff's portion of said highway at said time and place,

f) In driving and operating her said Oldsmobile automobile from her own portion of the highway over onto plaintiff's side of the highway without any signal, sign or warning of her intention so to do,

g) In driving and operating her said Oldsmobile automobile at said time and place over onto plaintiff's portion of the highway when the same could not be so operated without injury and harm to this plaintiff, and

h) In driving and operating her said Oldsmobile automobile without maintaining a proper lookout ahead for other vehicular or automobile traffic lawfully upon said road or highway at said time and place.

14.) Plaintiff says that as a result of defendant decedent's driving and operating her car into and against plaintiff's car, the plaintiff received a crushing force and blow to her head, body, arms and legs resulting in a bruising and twisting of her entire head, neck, body, arms and legs, as well as causing her to receive a wrenching and twisting of the joints, ligaments, nerves, veins, arteries and muscles over and about her entire person and body.

15.) Plaintiff says that the left portion of her head in the area of the hair was bruised and swollen and resulted in discoloration; that her nose was cut, impregnated with glass, swollen and made painful; that her mouth was cut and bruised in the area of her lips, cheeks and gums; that her lips were cut and bruised; that her teeth were loosened throughout the upper and lower jaw; that one front upper tooth was broken and another front upper tooth was cracked, and that various other front and back teeth, in both the upper and lower jaws, were chipped; that the nerves in her teeth sustained trauma and injury and have been permanently injured.

16.) Plaintiff further says that she sustained three (3) fractured ribs on her right side of her chest; that she suffered and sustained a fractured patella in the knee of the right leg with a loss of a portion of said patella, together with cuts and lacerations over and about her head, face, body, arms and legs from broken glass.

17.) Plaintiff says that she was in pain and shock following said accident and was removed to Bamberg County Hospital where she was placed under the care and attention of physicians and nurses from the 5th day of November, 1961, until the 16th day of December, 1961, during which time surgery, in the nature of an open reduction, was performed on the right knee; that she was totally confined to her hospital bed, and that she was placed under drugs and medicine to alleviate the pain from the fractures, wounds,

bruises and injuries which she had over and throughout her person and body. Plaintiff says that while she was hospitalized in Bamberg, South Carolina, she developed as a result of her injuries a thrombo phlebitis condition in the right leg, all of which caused her pain and suffering, and together with her other injuries rendered it impossible for her to sleep, eat or rest normally or properly.

18.) Plaintiff says that during the time she was hospitalized at Bamberg, South Carolina, her head was swollen, sore and painful; that she suffered headaches and still to this date continues to suffer headaches; that during the time she was in the Bamberg County Hospital, her nose was swollen and sore; her arms were discolored and sore, and that she was unable to normally move the same, and still has pain and difficulty in the normal movement of her arms, and more particularly there has developed a numbness in the left arm and hand; that during her confinement in the hospital in Bamberg, South Carolina, she had difficulty in breathing and, as of this date, still experiences pain in deep breathing.

19.) Plaintiff says that on December 16, 1961, she was removed from Bamberg County Hospital and admitted to Akron City Hospital in Summit County, Ohio, on the 21st day of December, 1961, where she was confined under treatment and care for her injuries until the 6th day of January, 1962. During her confinement in Akron City Hospital she was treated for a swelling of both the right and left leg and for a limitation of motion involving both legs.

20.) Plaintiff says that after her confinement and treatment in Akron City Hospital and her discharge therefrom, she continued under further medical care and attention and was again hospitalized on the 2nd day of August, 1962, until August 12, 1962, at Medina Hospital in Medina, Ohio, for an examination and treatment of the continuing thrombo phlebitis condition of the right leg.

21.) Plaintiff says that during said hospitalization confinement and the intervals between hospitalization and up to the present time, she suffers pain and discomfort and is unable to sleep, eat or rest properly and that she has difficulty in walking and moving about by reason of her injuries.

22.) Plaintiff says that she sustained an injury to her sacroiliac as a result of said automobile accident and that she has had discoloration marks on her body for many months following said accident, and that she continually suffers pain, discomfort and limitation of motion in her arms, back and legs, and avers that all of the said injuries to her head, teeth, bones, blood vessels, nerves, muscles, joints and ligaments are permanent and that she will never regain her former good health which she had prior to said accident and that she will never again be able to be active and engage in activities as she was able to do prior to said accident; that she will continue to suffer pain and discomfort for the remainder of her natural life and will be required to be under the care and treatment of doctors and nurses.

23.) Plaintiff further says that as a result of the injuries which she suffered and sustained in said accident she has been obliged to expend and contract for medical care, nursing, hospitalization and drugs the sum of Thirty-three Hundred Dollars ($3,300) to date and that she will be obliged to expend additional money and contract for further care and treatment in the future.

24.) Plaintiff further says that she sustained the first One Hundred Dollars ($100) damage to her automobile for which she has not as yet been compensated and that said property damage is part of her claim herein.

25.) Plaintiff further says that all of the pain, sickness, disability, discomfort and injuries which she has suffered and will continue to suffer, as long as she lives, together

with the expenditures of money for medical care and services now expended and those to be expended in the future, together with her property damage herein, were brought about and caused solely and proximately as a result of the negligence of defendant's decedent as hereinbefore set forth, and that by reason thereof, she has been damaged in the sum of One Hundred Twenty-five Thousand Dollars ($125,000) for which amount she prays judgment.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of One Hundred Twenty-five Thousand Dollars ($125,000) and her costs.

(s) VIRGIL F. MILLS
MILLS & MILLS
917 First National Bank Bldg.
Canton 2, Ohio
Attorneys for Plaintiff.

DEFENDANT'S ANSWER

Now comes the defendant in the above entitled action and makes Answer to the Plaintiff's Complaint as follows:

1. The defendant admits the allegations in Paragraph 1 of the Plaintiff's Complaint, but denies that the amount in controversy exceeds exclusive of interests and costs the sum of $10,000.00.

2. The defendant admits the allegations in Paragraph 2.

3. The defendant admits the allegations in Paragraph 3.

4. The defendant admits the allegations contained in Paragraph 4.

5. The defendant denies that Notice of Claim was given to the defendant or filed with the Registrar of Probate of Essex County as provided for and required by Chapter 197, Section 9 of the General Laws of the Commonwealth of Massachusetts.

6. The defendant denies the allegations contained in Paragraph 6. In further answering the defendant says that this action and the claim which is the subject matter of this action are barred by the provisions of Chapter 197, Section 9 of the General Laws of the Commonwealth of Massachusetts.

7. The defendant admits the allegations contained in Paragraph 7.

8. The defendant admits the allegations contained in Paragraph 8.

9. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint, and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

10. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint, and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

11. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint, and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action. The defendant further denies that the deceased was negligent in the operation of her motor vehicle or that she violated any of the laws pertaining to the operation of motor vehicles at the time and place alleged in this paragraph.

In further answering this paragraph, the defendant says that the plaintiff, herself, was contributorily negligent in the operation of her motor vehicle, and is therefore, not entitled to recover in this action.

12. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint,

and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

13. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint, and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

14.-24. inclusive. The defendant has no knowledge of the allegations as to personal injuries, medical expense, disability and other damages alleged by the plaintiff to have been sustained by her in these paragraphs of the Complaint. The defendant, therefore, neither admits nor denies the allegations contained therein, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

25. The defendant denies that the plaintiff's injuries and damages are as alleged by the plaintiff in this paragraph. The defendant further denies that the injuries sustained by the plaintiff as may be established by competent testimony at the trial are in the sum of money claimed by the plaintiff as damages in this action.

26. The defendant further answering the Plaintiff's Complaint says that this action cannot be maintained against the defendant executor of the Estate of Louise Plumer Osgood for the reason that it is brought contrary to and in violation of the provisions of Massachusetts General Laws (Ter. Ed.) Chapter 197, Section 9.

27. The defendant hereby claims a trial by jury of this action.

By his Attorney,

ALFRED E. LOPRESTI
44 School Street
Boston 8, Massachusetts

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes the defendant in the above entitled action and moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a judgment in the defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

In the affirmative, the defendant moves upon the pleadings herein, the affidavit of the defendant, Edward M. Plumer, Jr. sworn to April 15, 1963, annexed hereto, the two certificates of the Probate Court for the County of Essex, annexed hereto, and the certificates and return of the United States Marshal in this action for Summary Judgment in favor of the defendant in this action.

This motion is based upon the contention of the defendant as set forth in paragraphs 5 and 6 of the defendant's answer that this action was not brought in accordance with the requirements of the General Laws of Massachusetts, Chapter 197, Section 9.

By his Attorneys,
(s) ALFRED E. LOPRESTI
(s) JAMES T. CONNOLLY

OPINION

October 17, 1963

SWEENEY, CH.J. This motion for summary judgment raises the narrow question whether the action is timely in conformity with the short statute of limitations, M.G.L.A. c. 197, § 9. The defendant was qualified as executor by giving bond on March 1, 1962. The plaintiff, who has a claim against the estate, filed this complaint on February 6, 1963. Service was made the following day by leaving a

copy of the summons and complaint at the defendant's last and usual place of abode in the hands of his wife. While completely proper under Rule 4(d), F.R.C.P., this was not service in hand as required by c. 197, § 9.

M.G.L.A. c. 197, § 9, provides as follows:

> "Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . ."

Jurisdiction in this case is based on diversity of citizenship and the Massachusetts statute, therefore, controls. *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530 (1949). *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945).

Under the statute, three courses were open to the plaintiff: 1) service by delivery in hand upon the defendant within one year after the latter qualified, 2) acceptance by the defendant of service within that time, or 3) filing of notice in the proper registry of probate.

The plaintiff does not deny his failure to comply with the first alternative, but he argues that the defendant by filing an answer, accepted service of process. *Phillips* v. *Director General of Railroads*, 251 Mass. 263 (1925). In that case a substituted defendant appeared specially to contest jurisdiction, and the court held that this was equivalent to a waiver of the issuance of process. Here, however, the question is not one of waiver but whether the defendant

accepted service. His affidavit denies that he did, and a general appearance of the defendant does not cure service defective under this statute. *Epstein* v. *Blender*, 16 Mass. App. Dec. 75 (1957). Moreover, the fact that the defendant may have had actual notice of the action is irrelevant because, as Judge Aldrich pointed out in *John Boyle* v. *Margaret G. Moylan, Executrix*, Civil No. 54-507-A, D. Mass., November 17, 1955, "[T]he Massachusetts statute makes no such exception and apparently was intended to avoid altogether such factual issues."

With respect to the third alternative, the plaintiff also did not comply with the requirements of the statute in that the "notice" he filed did not show "the court in which the action has been brought," which, indeed, he could not show as the "notice" was filed more than nine months before this suit was instituted.

The motion for summary judgment is allowed.

JUDGMENT

SWEENEY, CH.J. After hearing on defendant's motion for summary judgment and in accordance with the Opinion of the Court handed down on October 17, 1963 allowing said motion, it is

ORDERED judgment for the defendant dismissing the plaintiff's Complaint.

By the Court
(s) F. J. AHERN
Deputy Clerk.

(s) GEO. C. SWEENEY
Chief Judge
United States District Court
11-14-63

NOTICE OF APPEAL

The Plaintiff hereby gives notice that he appeals from the judgment of this Honorable Court, dated November 14, 1963, to the United States Court of Appeals, for the First Circuit.

By his Attorneys,

SCHNEIDER & REILLY

By (s) ALBERT P. ZABIN

ADDITIONAL RECORD APPENDIX TO BRIEF OF APPELLEE.

The appellee hereby designates the following additional record appendix: The following documents attached to and submitted with defendant's motion for summary judgment:

1. Affidavit of Executor, dated April 15, 1963, that he had not been served in hand in the present action, and had never accepted service of process in said action.

2. The original summons and United States Marshal's return of service.

3. Certified copy by the Register of Probate for Essex County of notice of claim filed by the plaintiff in the Probate Court, dated April 17, 1962.

4. Certified copy by the Register of Probate for Essex County, dated March 20, 1963, indicating the defendant's appointment as executor of the estate of Louise Plumer Osgood, the date of the giving of his bond, and all docket entries.

Affidavit.

I, Edward M. Plumer, Jr. of Newbury, Essex County, Massachusetts, on oath depose and say that I am the duly appointed and qualified executor under the will of Louise Plumer Osgood, late of Newburyport in said County, Essex Probate No. 270749 and that the date of my appointment as such executor and that the approval of my bond as such executor was March 1, 1962; that at no time have I been served in hand in an action brought by Eddie V. Hanna, Docket No. CA63-91-S brought in the United States District Court for the District of Massachusetts and that I have never accepted service in said action.

EDWARD M. PLUMER, JR.

COMMONWEALTH OF MASSACHUSETTS.

Essex, ss April 15, 1963

Subscribed and sworn before me,

JAMES T. CONNOLLY
Notary Public
My commission expires Feb. 7, 1970

Summons.

Summons in a Civil Action

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Sweeney, Ch.J.

.....Division

Civil Action File No. 63-91-S

EDDIE V. HANNA
Plaintiff

v.

EDWARD M. PLUMER, JUNIOR,
Executor of the Estate of
Louise Plumer Osgood, Deceased,
Defendant

} SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Joseph Schneider, of the firm of Schneider & Reilly, plaintiff's attorney, whose address is 73 Tremont Street, City of Boston, Massachusetts, an answer to the complaint which is herewith served upon you, within twenty days

after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN J. CANAVAN
Clerk of Court.
HELEN I. TWEEDY
Deputy Clerk.

Date: February 6, 1963. [Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 7th day of February 1963, I received this summons and thereafter on the 8th day of February 1963, at 4:00 PM I summoned the within defendant, Edward M. Plumer by leaving at his last and usual place of abode, 8 High Rd., Newburyport, in said District in the hands of his wife, Mrs. Edward M. Plumer, a true and attested copy of this Summons together with copy of Complaint.

Marshal's Fees	
Travel	$8.88
Service	3.00

ROBERT F. MOREY
United States Marshal.
By F. J. OCZKOWSKI
Deputy United States Marshal.

Subscribed and sworn to before me, this day of 19

[SEAL]

.....

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

UNITED STATES OF AMERICA
DISTRICT OF MASSACHUSETTS } ss:

I, John A. Canavan, Clerk of the United States District Court for the District of Massachusetts, do hereby certify that the annexed and foregoing is a true and full copy of the original summons issued on February 6, 1963 and returned and filed in the office of the Clerk on February 20, 1963 in the cause entitled:

EDDIE V. HANNA v. EDWARD M. PLUMER, JUNIOR, Executor of the Estate of Louise Plumer Osgood, Deceased and numbered on the Civil Action docket 63-91-S now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Boston this 7th day of March, A. D. 1963.

JOHN A. CANAVAN
Clerk.
By HELEN I. TWEEDY
Deputy Clerk.

Notice of Claim.

COMMONWEALTH OF MASSACHUSETTS
Essex, ss. PROBATE COURT

To the Register of Probate for the County of Essex:

Please file the following Notice of Claim in the estate of Louise Plumer Osgood late of 225 Water Street, Newberryport, Massachusetts in said County.

To Edward M. Plumer, Jr. 8 High Road of Newbury, Massachusetts in the County of Essex Executor of the will of said Louise Plumer Osgood

This notice is given you under and by virtue of

Section 20 of Chapter 202 of the General Laws of Massachusetts

Section 9 of Chapter 197 of the General Laws of Massachusetts

The estate of said Louise Plumer Osgood is indebted to the undersigned in the sum of One Hundred Twenty-five Thousand and no/100 Dollars for damages and injuries suffered to the person and property of Eddie Hanna by reason of the negligence and fault of Louise Plumer Osgood

April 17, 1962.

Name of Claimant, MRS. EDDIE HANNA.
Address of Claimant, 1000 S.E. 4th St Ft. Lauderdale, Fla.

By her Attorney Mills & Mills, Attorneys at Law, 917-1st Nat'l Bank Bldg., Canton 2, Ohio

ESSEX, ss.

PROBATE OFFICE
Mar. 20, 1963

A true copy
Attest:

JOHN J. COSTELLO
Register

Appointment of Executor.

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT

ESSEX, ss. DOCKET No. 270742

I, JOHN J. COSTELLO, Register of Probate for said County of Essex hereby certify, that at a Probate Court held at

Salem in and for said County, on the first day of March in the year of our Lord one thousand nine hundred sixty-two, Edward M. Plumer, junior, of Newbury in the County of Essex was duly appointed executor of the will of Louise Plumer Osgood, late of Newburyport in said County of Essex and gave bond as required by law, for the due performance of said trust.

I further certify, that it appears by the records and files of said Court, that said appointment remains in full force.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this twenty-fourth day of January in the year of our Lord one thousand nine hundred sixty-three.

JOHN J. COSTELLO
Register.

Docket Entries.

270749	Osgood, Louise Plumer, Newburyport	
	Date of death January 6, 1962 (See Cons. 270353)	
	Pet. for Prob. of Will (filed Jan. 8, 1962) Fee Pd.	
	Will 1298 462	(" Jan. 8, 1962)
	Affidavit of Witness	(" Jan. 10, 1962)
	Citation & Return of Service	(" Feb. 2, 1962)
	Bond Fee Pd.	(" Feb. 27, 1962)
	Military Affidavit	(" Feb. 27, 1962)
1962 Mar. 1	Prob. & Bond, Edward M. Plumer, Jr., Nby. Exor.	
1962 Apr. 23	Pet. for Authority to sell motor vehicle (filed Apr. 10, 1962) Fee Pd.	
	Notice of Claim	(filed Apr. 25, 1962)

ESSEX, ss. PROBATE OFFICE
Mar. 20, 1963

A true copy of docket entries.
Attest:

JOHN J. COSTELLO
Register.

[fol. 25]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6272

EDDIE V. HANNA, Plaintiff, Appellant,

v.

EDWARD M. PLUMER, JR., Executor,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Albert P. Zabin, with whom *Schneider & Reilly* was on brief, for appellant.

Alfred E. LoPresti and *James T. Connolly* for appellee.

OPINION OF THE COURT—April 29, 1964.

ALDRICH, *Circuit Judge*. This is an action in which plaintiff, a citizen of Ohio, claims damages in excess of $10,000 for personal injuries as a result of an automobile accident in South Carolina allegedly caused by the negligence of a Massachusetts citizen, now deceased. The defendant, also a Massachusetts citizen, is the decedent's executor. The defendant qualified as executor by filing bond on March 1, 1962. On February 6, 1963 the complaint was filed in the district court for the District of Massachusetts. On February 8 service was made by leaving a copy of the summons with the defendant's wife at his residence, in compliance with F.R.Civ.P. 4(d)(1). The defendant's answer was filed [fol. 26] on February 26. The so-called "short statute of limitations," Mass. G.L. (Ter. Ed.) c. 197 §9, provides that

actions against an executor must be "commenced within one year from the time of his giving bond." In addition to timely commencement, the statute provides that the executor "shall not be held to answer" unless within the year he had been served in hand, or "service . . . [is] accepted by him," or there has been filed in the proper registry of probate a notice identifying the claim, the claimant and "the court in which the action has been brought." In her complaint plaintiff alleged that she had already filed the requisite notice in the registry of probate, and asserted that the action had been brought "within the time required and in accordance with the procedure of the law of the Commonwealth of Massachusetts in [sic] filing suit against the said decedent's Estate." Defendant's answer denied these allegations, and affirmatively alleged that the action could not be maintained because it had been "brought contrary to and in violation of the provisions of . . . Section 9." At the time the answer was filed it was in fact still possible to comply with the statute. However, plaintiff took no further action.

After March 1, 1963 defendant moved for summary judgment with an affidavit revealing that the notice filed in the probate registry made no mention of the court in which the action had been or even was to be brought, or, indeed, that any action was even contemplated. No countering affidavit was filed. The notice thus must be taken as materially defective. *Cf. United States* v. *Saxe*, 1 Cir., 1958, 261 F.2d 316, 320. Alternatively, the service of process did not satisfy the special notice requirements of the executor's statute, not having been made in hand, nor had the defendant in terms accepted service. The district court, holding the Massachusetts statute was controlling and on [fol. 27] these facts not complied with, granted the defendant's motion for summary judgment. From this plaintiff appeals.

In this court plaintiff abandons the allegations of her complaint that she had complied with the Massachusetts "procedure," but asserts that such compliance was unnecessary because, since the action was brought in the federal court, the matter was one of federal procedure

governed by F.R.Civ.P. 4(d)(1). We think it clear, however, that we are concerned with a substantive rather than a procedural matter. The service of process by the so-called "last and usual" method was in entire compliance with both Rule 4(d)(1) and the usual Massachusetts procedure, so far as service was concerned. Further, the action was commenced in time, and served in time, in full compliance with the requirements of the ordinary Massachusetts statutes of limitations. The difference was that in addition to service sufficient to satisfy due process requirements for in personam jurisdiction, the executor, a creature of the Massachusetts court charged with the administration and disposition of the estate sought to be reached, was by law entitled to receive specific notification of the action within the year. Special statutes of limitations to effectuate the safe and "speedy settlement of estates that the heirs might be quieted," *Brown* v. *Anderson*, 1816, 13 Mass. 201, 202, have been operative in the Commonwealth for over 150 years. Relatively recent amendments evince a clear legislative purpose to require personal notification within the year, ascertainable of record. St. 1931, c. 417, §1; St. 1954, c. 552, §1. See discussion in *Parker* v. *Rich*, 1937, 297 Mass. 111, 113; Judicial Council of Massachusetts Twenty-ninth Report 46 (1953), 38 Mass. L.G. 46 (December 1953). This matter is quite apart from the question of what is adequate service of process in the procedural sense. Actual, record notice would appear [fol. 28] fully as substantive a state requirement binding in the federal court as is a requirement that in certain actions a bond must be furnished for costs. *Cf. Cohen* v. *Beneficial Loan Corp.*, 1949, 337 U.S. 541. And see, in a more closely related question, *Ragan* v. *Merchants Transfer & Warehouse Co.*, 1949, 337 U.S. 530.

Since the defendant's success would seemingly entirely bar plaintiff's remedy, and in view of the importance of the matter, even though plaintiff does not argue the point we will consider the correctness of defendant's contention that the Massachusetts statute was not in substance satisfied. We put to one side any contention that the statutory requirements were so loose that actual notice might be

established by proof aliunde. *But cf. Fleisher Eng'r & Constr. Co.* v. *United States,* 1940, 311 U.S. 15. The statutory rigidity, which its history shows has been increased rather than diminished, forbids such a construction. On the other hand, an examination seems warranted of the consequence of the voluntary filing of an answer when the statute states that an answer shall not be required. We would agree that the filing of an answer after the year had expired would be without legal effect in view of the settled Massachusetts principle that an executor cannot waive absolute rights of his estate. *Finance Corp. of New England* v. *Parker,* 1925, 251 Mass. 372; *Rosenblatt* v. *Foley,* 1925, 252 Mass. 188; *Galto* v. *Foley,* 1936, 296 Mass. 306, 310; *Epstein* v. *Blender,* 1957, 15 Mass. App. Dec. 74. However, where such rights have not become established, the filing of a general appearance or answer within the year might well be regarded as an acceptance of service, an action specifically authorized. *Cf. Tobin* v. *Downey,* 1942, 310 Mass. 721; *Lapresti* v. *Burton,* 1936, 295 Mass. 6. That, however, is not this case. We could not construe as an "acceptance" of service an answer which specifically complained of the impropriety of the service and the lack of proper notice. *Cf.* F.R.Civ. [fol. 29] P. 12(b). If this view be thought unduly technical we might add that it is entirely conceivable that the decedent driver was insured, and that the summons may have been forwarded to the company, and by it to its counsel, without any action by or actual notice to the executor.

Judgment will be entered affirming the judgment of the District Court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—April 29, 1964.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Roger A. Stinchfield, Clerk.

Approved: Peter Woodbury, Ch. J.

Thereafter, on May 5, 1964, mandate was stayed.

[fol. 30]

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 31]

SUPREME COURT OF THE UNITED STATES

No. 171, October Term, 1964

EDDIE V. HANNA, Petitioner,

vs.

EDWARD M. PLUMER, JR., Executor

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 10 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 171

EDDIE V. HANNA,
PETITIONER,

v.

EDWARD M. PLUMER,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No.

EDDIE V. HANNA,
PETITIONER,

v.

EDWARD M. PLUMER,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the above-entitled case, entered April 29, 1964.

Citation to Opinions Below

The memorandum opinions of the District Court (R13-15) and of the Court of Appeals (R25-29) are both, as yet, unreported and are printed in Appendix B, and pages 13-15 of the record.

Jurisdiction

Jurisdiction of the United States District Court for the District of Massachusetts was invoked under 28 U.S.C. 1332(a)(1).

The judgment of the Court of Appeals was entered on April 29, 1964 (R29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1948).

Question Presented

Whether in a civil action, where the jurisdiction of the District Court is based on the diversity of citizenship between the parties, service of process shall be made in the mode and manner prescribed by state law or by the Federal Rules of Civil Procedure.

Statutes Involved

The statutory and constitutional provisions involved are *U.S. Constitution* Art VI, cl.2; 28 *U.S.C.* 2072 (1948); Rule 4(d)(1), Federal Rules of Civil Procedure; Mass. Gen. Laws (Ter. Ed.) c. 197 sec. 9 (1958). They are presented in Appendix A, infra.

Statement

This is an action brought in the United States District Court for the District of Massachusetts in which Mrs. Eddie V. Hanna, a citizen of Ohio, seeks to recover damages in excess of $10,000 for serious personal injuries sustained in an automobile accident caused by the negligence of a Massachusetts citizen now deceased and which occurred in South Carolina. The defendant, also a Massachusetts citizen, is

the decedent's executor. Jurisdiction of the United States District Court was based on diversity of citizenship. The defendant qualified as executor by filing a probate bond on March 1, 1962. The complaint was filed on February 6, 1963, and on February 8, 1963, the deputy United States Marshal served the defendant, by leaving a copy of the complaint and summons at the defendant's last and usual place of abode in the hands of his wife, (R2) in full compliance with Fed. R. Civ. Pro., Rule 4(d)(1). The defendant filed his answer on February 26, 1963.

Mass. Gen. Laws (Ter. Ed.) c. 197, sec. 9 (1958) provides that actions against an executor must be "commenced within one year from the time of his giving bond." In addition to this requirement of timely commencement, the statute requires that before the expiration of the year the executor must be served in hand; unless a notice of the claim is on file in the appropriate registry of probate, or unless the executor "accepts" service. (The plaintiff's Ohio counsel did file such a notice, but it was technically invalid, as it did not state the name of the court in which the claim was pursued, R20-21.)

The defendant propounded interrogatories to the plaintiff on August 5, 1963, (R1) and on August 26, 1963, moved for summary judgment on the ground that since jurisdiction was based solely on the diversity of citizenship between the parties, the failure of the plaintiff to make in hand service, as required by *Mass. Gen. Laws* (Ter. Ed.) c 197 sec 9 (1958), was fatal to the action. The District Court allowed the motion, and on appeal, the United States Court of Appeals for the First Circuit, Aldrich, J., affirmed.

Reasons for Granting the Writ

1. The Decision of the Court of Appeals Raises Important Federal Statutory and Constitutional Questions involving the Federal Rules of Civil Procedure.

There is no question of the timeliness of the plaintiff's action, for as the Court of Appeals noted, ". . . the action was commenced in time and served in time. . . ." (R27), for purposes of other Massachusetts statutes of limitations. The action was also timely for purposes of *Mass. Gen. Laws* c. 197, sec. 9 (1958) as well, because for purposes of the statute here involved, as for other Massachusetts statutes, an action is "commenced" when process is delivered to an appropriate officer with the intent that he serve it. *Gray* v. *Dahl*, 297 Mass. 260, 8 N.E. 2d 919 (1937); *Parker* v. *Rich*, 297 Mass. 121, 8 N.E. 2d 345 (1937). Filing a statutory notice is merely an alternative to *in hand* service and is for the benefit of a plaintiff who, for one reason or another, may not be able to make in hand service on an executor and is clearly not a condition precedent to the tolling of the statute of limitations or to the bringing of an action against an executor. *United States* v. *Saxe*, 261 F.2d 316 (1 Cir., 1958). Therefore, Mrs. Hanna is being deprived of her day in court simply because she fully and punctiliously complied with an applicable Federal Rule of Civil Procedure, in a Federal Court sitting in a state which happens to require a different mode of service, designed to give a more "specific" notice, than that provided by Rule 4(d)(1) of the Federal Rules of Civil Procedure.

The significance of such a decision can hardly be overstated. The Court below has held that this is "a substantive rather than a procedural matter" (R27), and this holding will plague litigants in Federal Courts on a nation-

wide scale, for there are no less than twenty-five states whose rules and statutes provide for a mode of service designed to provide the defendant a more "specific" notice of the action pending against him, than the notice provided by Rule 4(d)(1). Provisions of these states range from requirements that service be made on a member of the defendant's family (instead of anyone residing at his home) to a requirement that the sheriff read the summons to the defendant.[1] For example, California requires that service upon a competent adult be made "personally," *Code of Civil Procedure* sec. 416, and service upon a member of the defendant's family is not sufficient service, *Sternbeck* v. *Buch*, 148 Cal. App. 2d 829, 307 P. 2d 970 (1957). Kentucky, *Ky. Rev. Stat., Rules of Civil Procedure*, Rule 4.04, Maryland, *Rules of Civil Procedure* 104(b)(1)(2), and Michigan, Mich. *Rev. Jud. Act* sec. 600. 1912 (1961), also require in hand service (except that if the defendant has an agent for service, service may be made on such agent in Kentucky and Michigan.)

20 *Tenn. Code Ann.* sec. 20-214 (1955) provides that "original process shall be served by reading the same to the defendant, or offering to read it in case he neglects or refuses to hear it read." Thus, under this statute, service upon a husband by leaving the papers with the wife is invalid, even though the husband actually read the summons. *Carter* v. *Kaiser*, Tenn. Ch. App. 48 S.W. 265 (1895).

The New York *Civil Practice Law & Rules* sec. 308 requires that "personal service upon a natural person shall be made by delivering the summons within the state to the person to be served," or upon an agent for service desig-

[1] In addition to Massachusetts, the states are Arkansas, California, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, Mississippi, Montana, Nevada, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, West Virginia and Wisconsin.

nated under Rule 318 of the Act. If service cannot be made in compliance with the first paragraph with "due diligence," then, and only then, may substituted service be made. N. Y. *Civ. Prac. Law & Rules*, sec. 308 (3). Even more stringent than N. Y. *Civ. Prac. Law & Rules* is *Miss. Code Ann.*, sec. 1869 (1942). Mississippi requires in hand service upon a defendant, but, if he cannot "be found in the county," service may be made by leaving the process at his home with a member of his family who is "willing to receive" service. If the defendant cannot be found or no member of his family living at home is "willing" to receive service, then the process must be posted "on a door of the defendant's usual place of abode." See also *Ill. Rev. Stat.* (1961) C. 110, sec. 13.2 (member of family upon whom service is made must be "informed" of contents and process mailed to defendant unless the defendant is served in hand).

It requires no prolonged analysis to understand that the provisions of the service statutes and rules of these states are designed to give the defendant specific and reliable notice, just as is *Mass. Gen. Laws* (Ter. Ed.) c. 197 sec. 9 (1958). The decision of the Court below in the case at bar holds that the requirement of in hand service creates a substantive right which is somehow abridged by the application of Rule 4(d)(1). If the Massachusetts statutes creates a substantive right as that term is used in the Enabling Act under which this Court promulgated the Federal Rules of Civil Procedure, 28 *U.S.C.* 2072 (1948), do not all these other state statutes and rules also create substantive rights? With the decision in the case at bar, the Court of Appeals has sown dragon teeth, and this case will be a danger to litigants and a thorn in the side of the Federal Courts throughout the nation. Defendants will not be slow to trap other plaintiffs who have relied on conformity to the Federal Rules relating to service. The case

at bar is not the first. The first is the unreported case of *Doyle* v. *Moylan*, Civil No. 54-507-A (D. Mass., 1955) (Appendix C). The facts of that case are almost precisely the same as the facts of the case at bar. It involved the same statute, and service was made in full compliance with Rule 4(d)(1), within the one-year limitation period in each case. The only differences were that in *Doyle* the defendant did not file an answer within the year, as here, and that in *Doyle*, Judge Aldrich (then a U. S. District Judge) relied on *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945) in dismissing the action. Alert counsel all over the nation will use the decision of the Court below, as counsel in this case used *Doyle* v. *Moylan supra*. The basic question involved in this case is nothing less than the future of the Congressional and Judicial policy of uniformity of service, and perhaps of all procedure, in the Federal Courts.

2. THERE IS A CONFLICT BETWEEN THE CIRCUITS.

The decision of the Court of Appeals is in conflict with *Jacobwitz* v. *Thompson*, 141 F.2d 72 (2 Cir., 1944) and *Doyle* v. *Loring*, 107 F.2d 337 (6 Cir., 1939). *Jacobwitz* v. *Thompson, supra* was an action for wrongful death. The defendant, not a resident of New York, was trustee in bankruptcy of a railroad. Jurisdiction was based on diversity of citizenship. The defendant had maintained a financial office in New York and service was made on the "fiscal representative" under Fed. R. Civ. Pro., Rule 4(d)(3). The defendant moved to quash service on the ground that, as a natural person, who was a non-resident, he could be served only in accordance with the New York Civil Practice Act sec. 229-b, which had not been complied with. The Court of Appeals (on cross appeal) affirmed the denial of the motion, holding that since (what is now) 28 U.S.C. sec. 959 (1948) put a receiver on the same footing as a railroad for purposes of

service, service under Rule 4(d)(3) was proper. Federal statutes governing service were thus held applicable even in "diversity cases." The fact that the federal law whose applicability was challenged was a statute and not a Federal Rule of Civil Procedure does not mitigate the conflict between *Jacobwitz* and the case at bar, for two reasons. First, in a diversity case the Federal government may not constitutionally deprive a litigant of state-created substantive rights, *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64 (1938) and if a litigant has a substantive right to be served in a particular manner, the Federal government may not abrogate that right by decisions, rule or statute. Second, the Federal Rules of Civil Procedure have the force and effect of a Congresional statute. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1940); *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949). Thus, *Jacobwitz* stands for the proposition that in diversity cases the mode of service upon a defendant is a matter of procedure, whereas, the Court of Appeals in the case at bar has held that this case involves "a substantive rather than a procedural matter." (R27).

Doyling v. *Loring*, was suit against a foreign administratrix qualified to administer an estate in Tennessee. Jurisdiction was based on diversity of citizenship. Tennessee permitted service upon a qualified foreign executor by leaving process with the county clerk, and the plaintiffs served the defendant under this statute. The Circuit Court of Appeals for the Sixth Circuit held that service was invalid because (1) the venue was improper under Federal law and state law could not change that and held (2) "Moreover, the service of process in equity cases is controlled by Equity Rule 13 . . ." (Equity Rule 13 was the predecessor of Rule 4(d)(1) was substantially the same. See 2 Moore's Federal Practice, 928 (1949).) Admittedly, the conflict here involves an alternative holding, but it is a real conflict, nonetheless, for as this Court stated "where a decision rests on

two or more grounds, none can be relegated to the category of *obiter dictum*. . . ." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537-538 (1949). The fact that *Doyling* v. *Loring*, was a suit in equity is of no consequence as actions at law and suits in equity are merged. Fed. R. Civ. Pro., Rule 2. The questions in *Jacobowitz* and *Doyle* are thus the same as that involved in the case at bar, and both the former cases are irreconcilable with the decision of the Court below.

3. The Decision of the Court of Appeals in the Case at Bar is in Conflict With Applicable Decisions of This Court.

The Court of Appeals has decided that service under Rule 4(d)(1), in the face of a state statute containing stricter service and notice requirements, is a matter of substance. It does not support this holding on the ground that the mode of service would have altered or in any way would have affected the outcome of the litigation, see *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), or that service made under Rule 4(d)(1) deprived the defendant of any real benefit granted by state law or by citing any applicable case. However, the Court below suggests a similarity between the case at bar and *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). The cases are plainly distinguishable. In *Cohen*, New Jersey required a plaintiff in a stockholders suit who owned less than a certain portion of the stock to post a bond to reimburse the defendant for the expenses of the suit if the plaintiff did not make good his claim. This created an obligation where none existed before, and exposed a plaintiff to a new and substantial liability.

Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) also cited by the Court below is inapposite as it involved a question of the timeliness of a suit. The only issue was whether the Kansas statute of limitations

was tolled when the complaint was filed or when service was made, as prescribed by Kansas law. There is no issue of timeliness in the case at bar, for service here did not extend the life of the cause of action by one second. The decision of the Court below cannot be explained as an application of the principles of *Cohen* and *Ragan*.

The *ratio decidendi* of the case at bar is found on Page 27 of the record. (Page 19, *infra*)

> "Special statutes of limitations . . . have been operative in the Commonwealth for over 150 years. Relatively recent amendment evince a clear legislative purpose to require personal notification within the year ascertainable of record. . . ."

The Court of Appeals has thus decided that the requirements of in hand service creates a substantive right, not because of any effect on the result of Federal litigation or because of any benefit to the defendant, but because of the policy of the Massachusetts legislature. Thus, service in hand is held to be a substantive right within the meaning of 28 *U.S.C.* 2072 (1948) because the Massachusetts legislature says so. The Court below has permitted a state legislature to interpret a Federal Statute and thus dictate how process shall be served in the Federal Court. It is the Supremacy Clause of the Constitution of the United States in reverse, and this holding is in conflict with decisions of this Court and other Federal Courts which have held that "state law cannot determine for the Federal Courts what shall be deemed sufficient service of process or sufficient appearance of parties." e.g. *Insurance Co.* v. *Bangs*, 103 U.S. 435 (1880); *Beers et al* v. *Haughton*, 9 Pet. (34 U.S.) 329 (1835) (Story, J.); *Southern Pac. Co.* v. *Denton*, 146 U.S. 202 (1892), *Clark County Nevada* v. *City of Los Angeles*, 92 F. Supp. 28 (D. Nev., 1950).

The significance of the decision of the Court below will be tremendous, if not reviewed by this Court, for it will make the state legislatures the final arbiters of which Federal Rules of Civil Procedures abrogate or enlarge substantive rights, so as to fall beyond the authority granted this Court by 28 U.S.C. 2072 (1948). If the legislative history of *Mass. Gen. Laws* (Ter. Ed.) c. 197 sec. 9 (1958) is the test of whether or not the application of Rule 4(d)(1) abrogates a litigant's substantive rights, then the legislative history of the California Code of Civil Procedure, of the Mississippi Code, of the Illinois Revised Statutes, and of the New York Civil Practice Act will determine whether Rule 4(d)(1) or any other Federal Rule of Civil Procedure has abrogated or enlarged a litigant's substantive rights. This decision permits the states to interpret a Federal statute and decide if the Supreme Court of the United States has exceeded the authority to promulgate rules of procedure granted it by Congress. If Article VI, Cl. 2 of the Constitution of the United States has any relevance to the Federal Judiciary which is created under the authority of Article III of the Constitution, the decision of the Court below must not stand unreviewed or unclarified by this Court, for it will destroy not only uniformity of Federal Civil Procedure, but will weaken the independence of the Federal Judicial System, for "Substantive Right" has been translated into "States' Rights." The fact that the respondent is an executor in no way weakens the destructive thrust of the opinion of the Court below. The Court of Appeals seems to attach no significance to the defendant's capacity except to allude to the defendant as "a creature of the Massachusetts Court." It is quite clear that an executor is not a creature of the state, as is a corporation. An executor is a natural person (whose liability is personal to the extent of the estate assets) who is granted the authority by the Probate Court to administer

a decedent's estate. He is no more a creature of the state than is a partner. See *Boudreau* v. *New England Transportation Co.*, 315 Mass. 423; 53 N.E. 2d 92 (1944). Furthermore, the service statutes of other states seems to apply to all defendants who are natural persons, whatever their capacity. Furthermore, the Court of Appeals has also misconceived the importance to the Commonwealth of Massachusetts of the requirements of *Mass. Gen. Laws* (Ter. Ed.) c. 197 sec. 9 (1958), for section 12 of that chapter provides procedures for relief to a plaintiff whose action fails for a defect in service because of "unavoidable accident" and Section 10 even provides in certain cases for relief when an action is not commenced in time. Although these sections might not aid the petitioner in reinstating this action, they do indicate that the assumption of the Court below that section 9 is so vital to the State's rights, that a Federal Rule of Civil Procedure may not be applied in a "Diversity case," is not justified.

The decision of the Court below is also in conflict with cases decided by this Court involving the issue of what is to be considered procedural and what shall be considered substantive. The inquiry has been invariably directed to the effect of the challenged rule on the outcome of the litigation, *Erie R. R. Co.* v. *Tompkins, supra, Guaranty Trust Co.* v. *New York, supra, Mississippi Publishing Co.* v. *Murphree*, 326 U.S. 438 (1945) (Rule 4(f) held procedural) and to the effect of a particular classification of the rule in question on a conflicting Federal policy. *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958). The decision of the Court below is in conflict with the cited decisions of this Court, for the Court of Appeals never inquired whether or not a particular mode of service upon a defendant would substantially affect the outcome of this litigation. The method by which a litigant is brought before the Court and is given notice of the pending action,

Sechrist v. *Palshook*, 97 F. Supp. 505 (M.D. Pa. 1951), cannot possibly affect the outcome of the law suit, and, thus, cannot reasonably be classified as a matter of "Substance."

Furthermore, the Court of Appeals never gave any consideration to the Federal policies of uniformity of procedure throughout the District Courts of the United States, or the policy of permitting "freedom and flexibility of procedure in bringing home to the defendant . . . notice of the filing of the action." Barron & Holtzoff, *Federal Practice and Procedure*, sec. 171 (1960). In view of the non-existent effect of the mode of service, on the outcome these considerations of Federal policy should have been given controlling weight in the decision of this case. *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) and see *Iovino et al* v. *Waterson*, 274 F.2d 41, 2nd Cir., 1959). Its refusal to do so puts it in conflict with *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, *supra*, and was grave error.

Conclusion

This case presents troublesome issues of national importance in the administration of justice in the Federal Courts. Half the states in the union have service requirements which are designed to give a defendant more specific notice than do the Federal Rules of Civil Procedure, and the decision of the Court of Appeals could be applied in many if not all those states. There is a conflict between the decision of the Court below and the second and sixth circuits on the issue of whether in a diversity case the mode of service is a matter to be governed by the state law or Federal law.

Furthermore, the decision of the Court below is based on premises which challenge the application of the Supremacy Clause of the Constitution and is based on an approach to

the problem of the source of law in a diversity case completely at odds with the applicable decisions of this Court. Therefore, for these reasons, and because the plaintiff, has been deprived of a fair hearing of her claim simply because she followed the applicable Federal Rules of Civil Procedure, this Honorable Court should grant a writ of certiorari.

Respectfully submitted,

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Appendix A

UNITED STATES CONSTITUTION

ARTICLE VI, CLAUSE 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. SEC. 2072 (ENABLING ACT)

SEC. 2072. RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> • • • •
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended May 24, 1949, c. 139, sec. 103, 63 Stat. 104; July 18, 1949, c. 343, sec. 2, 63 Stat. 446; May 10, 1950, c. 174, sec. 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, sec. 12(m), 72 Stat. 348.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 4—PROCESS, (d)—SUMMONS: PERSONAL SERVICE.

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

MASS. GEN. LAWS (TER. ED.) c. 197 SEC. 9 (1958)

SEC. 9. COMMENCEMENT OF ACTION; EXTENSION OF LIMITATIONS BY COURT.

Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . .

Appendix B

United States Court of Appeals
For the First Circuit

No. 6272.

EDDIE V. HANNA,
PLAINTIFF, APPELLANT,
v.
EDWARD M. PLUMER, JR., EXECUTOR,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Albert P. Zabin, with whom *Schneider & Reilly* was on brief, for appellant.
Alfred E. LoPresti and *James T. Connolly* for appellee.

OPINION OF THE COURT.

April 29, 1964.

ALDRICH, *Circuit Judge*. This is an action in which plaintiff, a citizen of Ohio, claims damages in excess of $10,000 for personal injuries as a result of an automobile accident in South Carolina allegedly caused by the negligence of a Massachusetts citizen, now deceased. The defendant, also a Massachusetts citizen, is the decedent's executor. The defendant qualified as executor by filing bond on March 1, 1962. On February 6, 1963 the complaint was filed in the district court for the District of Massachusetts. On February 8 service was made by leaving a copy of the summons

with the defendant's wife at his residence, in compliance with F.R.Civ.P. 4(d)(1). The defendant's answer was filed on February 26. The so-called "short statute of limitations," Mass. G.L. (Ter. Ed.) c. 197 §9, provides that actions against an executor must be "commenced within one year from the time of his giving bond." In addition to timely commencement, the statute provides that the executor "shall not be held to answer" unless within the year he had been served in hand, or "service . . . [is] accepted by him," or there has been filed in the proper registry of probate a notice identifying the claim, the claimant and "the court in which the action has been brought." In her complaint plaintiff alleged that she had already filed the requisite notice in the registry of probate, and asserted that the action had been brought "within the time required and in accordance with the procedure of the law of the Commonwealth of Massachusetts in [sic] filing suit against the said decedent's Estate." Defendant's answer denied these allegations, and affirmatively alleged that the action could not be maintained because it had been "brought contrary to and in violation of the provisions of . . . Section 9." At the time the answer was filed it was in fact still possible to comply with the statute. However, plaintiff took no further action.

After March 1, 1963 defendant moved for summary judgment with an affidavit revealing that the notice filed in the probate registry made no mention of the court in which the action had been or even was to be brought, or, indeed, that any action was even contemplated. No countering affidavit was filed. The notice thus must be taken as materially defective. *Cf. United States* v. *Saxe*, 1 Cir., 1958, 261 F.2d 316, 320. Alternatively, the service of process did not satisfy the special notice requirements of the executor's statute, not having been made in hand, nor had the defendant in terms accepted service. The district court,

holding the Massachusetts statute was controlling and on these facts not complied with, granted the defendant's motion for summary judgment. From this plaintiff appeals.

In this court plaintiff abandons the allegations of her complaint that she had complied with the Massachusetts "procedure," but asserts that such compliance was unnecessary because, since the action was brought in the federal court, the matter was one of federal procedure governed by F.R.Civ.P. 4(d)(1). We think it clear, however, that we are concerned with a substantive rather than a procedural matter. The service of process by the so-called "last and usual" method was in entire compliance with both Rule 4(d)(1) and the usual Massachusetts procedure, so far as service was concerned. Further, the action was commenced in time, and served in time, in full compliance with the requirements of the ordinary Massachusetts statutes of limitations. The difference was that in addition to service sufficient to satisfy due process requirements for in personam jurisdiction, the executor, a creature of the Massachusetts court charged with the administration and disposition of the estate sought to be reached, was by law entitled to receive specific notification of the action within the year. Special statutes of limitations to effectuate the safe and "speedy settlement of estates that the heirs might be quieted," *Brown v. Anderson*, 1816, 13 Mass. 201, 202, have been operative in the Commonwealth for over 150 years. Relatively recent amendments evince a clear legislative purpose to require personal notification within the year, ascertainable of record. St. 1931, c. 417, §1; St. 1954, c. 552, §1. See discussion in *Parker* v. *Rich*, 1937, 297 Mass. 111, 113; Judicial Council of Massachusetts Twenty-ninth Report 46 (1953), 38 Mass. L.Q. 46 (December 1953). This matter is quite apart from the question of what is adequate service of process in the procedural sense. Actual, record notice

would appear fully as substantive a state requirement binding in the federal court as is a requirement that in certain actions a bond must be furnished for costs. *Cf. Cohen* v. *Beneficial Loan Corp.*, 1949, 337 U.S. 541. And see, in a more closely related question, *Ragan* v. *Merchants Transfer & Warehouse Co.*, 1949, 337 U.S. 530.

Since the defendant's success would seemingly entirely bar plaintiff's remedy, and in view of the importance of the matter, even though plaintiff does not argue the point we will consider the correctness of defendant's contention that the Massachusetts statute was not in substance satisfied. We put to one side any contention that the statutory requirements were so loose that actual notice might be established by proof aliunde. *But cf. Fleisher Eng'r & Constr. Co.* v. *United States*, 1940, 311 U.S. 15. The statutory rigidity, which its history shows has been increased rather than diminished, forbids such a construction. On the other hand, an examination seems warranted of the consequence of the voluntary filing of an answer when the statute states that an answer shall not be required. We would agree that the filing of an answer after the year had expired would be without legal effect in view of the settled Massachusetts principle that an executor cannot waive absolute rights of his estate. *Finance Corp. of New England* v. *Parker*, 1925, 251 Mass. 372; *Rosenblatt* v. *Foley*, 1925, 252 Mass. 188; *Gallo* v. *Foley*, 1936, 296 Mass. 306, 310; *Epstein* v. *Blender*, 1957, 15 Mass. App. Dec. 74. However, where such rights have not become established, the filing of a general appearance or answer within the year might well be regarded as an acceptance of service, an action specifically authorized. *Cf. Tobin* v. *Downey*, 1942, 310 Mass. 721; *Lapresti* v. *Burton*, 1936, 295 Mass. 6. That, however, is not this case. We could not construe as an "acceptance" of service an answer which specifically complained of the impropriety of the service and the lack of proper notice. *Cf.* F.R.Civ.

P. 12(b). If this view be thought unduly technical we might add that it is entirely conceivable that the decedent driver was insured, and that the summons may have been forwarded to the company, and by it to its counsel, without any action by or actual notice to the executor.

Judgment will be entered affirming the judgment of the District Court.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 54-507-A

JOHN DOYLE

v.

MARGARET G. MOYLAN, Ex'x

OPINION

November 17, 1955

ALDRICH, D.J.

This motion for summary judgment raises a very narrow question. The defendant was appointed executrix on June 26, 1953. On June 24, 1954 the plaintiff, having a claim against the estate, commenced an action in this court by filing a complaint and taking out a summons. The summons was served by the deputy marshal the following day by leaving a copy with the defendant's husband at her usual place of abode; the defendant not being home. Her husband gave her the papers that evening. This was a "usual place of abode" service within Rule 4(d), but it was not a service in hand, the husband not having been specifically appointed by the court under Rule 4(c).

Throughout June, 1954, Mass. Gen. Laws, Ch. 197, §9, the short statute of limitations, read in part as follows:

> "Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced *but not entered* within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such

executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate . . ." (ital. suppl.)

This being a diversity case, this court is bound by the state statute. *Guaranty Trust Co.* v. *York*, 326 U.S. 99. It is clear that if this statute had not contained the italicized words "but not entered" (which words have since been stricken therefrom — Mass. Acts 1954, Ch. 552, §1), the action would be barred. Service in hand is now always required in an action against an executor or administrator unless the requisite notice of the action is filed in the proper Registry of Probate. No such notice was filed in the case at bar.

• • •

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Supreme Court of the United States.

October Term, 1964.

No. [redacted]171

EDDIE V. HANNA,
Petitioner,

v.

EDWARD M. PLUMER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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Supreme Court of the United States.

October Term, 1964.

No. 1206.

EDDIE V. HANNA,
Petitioner,

v.

EDWARD M. PLUMER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Jurisdiction.

Jurisdiction of the original case is founded in diversity of citizenship between defendant and plaintiff.

Question Presented.

Whether, in a diversity case, the courts of the United States, in enforcing a claim against the executor of a decedent's estate, are required to give full effect to the applicable state law relative to the settlement of estates, requirements of service on an executor and Statute of Limitations.

Statement of the Case.

The petitioner, a resident of Ohio, brings this action against the respondent, a resident of Massachusetts, as he

is executor under the will of a Massachusetts testatrix. The executor was duly appointed and qualified by giving bond on March 1, 1962, in the Probate Court for Essex County.

On April 25, 1962, before the action was brought, the plaintiff, through her attorneys, filed in the Probate Court a form purporting to be a "Notice of Claim" and purporting to be filed under General Laws, c. 202, § 20, and General Laws, c. 197, § 9.

The printed language in the form relating to the court in which action had been brought was stricken from the form, and no statement of the court in which action had been brought was included.

Thereafter, prior to March 1, 1963, the complaint was filed in the United States District Court for the District of Massachusetts. The respondent has not accepted service and the only purported service was by the United States Marshal's leaving a copy of process at the last and usual abode of the respondent. No notice stating the court in which the action has been brought has ever been filed in the Registry of Probate. The Massachusetts statute requires a creditor enforcing a claim against an executor or administrator to give specific notice within the year of administration in any one of three ways: (1) by service in hand on the executor; (2) by the executor's accepting service; or (3) by ordinary service plus a notice filed in the Probate Court within one year stating the court in which action has been brought.

Argument.

The pertinent parts of General Laws, c. 197, § 9, are as follows:

> ". . . an executor . . . shall not be held to answer to an action by a creditor of the deceased . . . which

> is commenced within [one] year [from the time of his giving bond] unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor . . . or service thereof accepted by him or a notice stating . . . the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . ." (As amended by St. 1954, c. 552, § 1.)

The petitioner now concedes that she had not complied with the requirements of the Massachusetts statute.

She argues, however, that service at the "last and usual" should be sufficient because of Federal Rules of Civil Procedure, Rule 4(d)(1). This ignores completely the obvious requirement of the statute that an executor is entitled to be specifically notified of the action so that he will not distribute the estate at the end of the year of his administration and thus render his personal assets liable to a judgment by a creditor. The Massachusetts statute does not require that service may be made only in hand, as petitioner's brief assumes, but merely permits this as one of three different ways of ensuring personal notification to the executor in time to keep him from distributing the assets of the estate. Service at the last and usual may be sufficient provided the plaintiff also files the requisite notice. It is a matter of substance that the executor should know of any action against an estate; otherwise he may be liable to a creditor for the entire assets of the estate he has distributed—a far more serious substantive matter than mere costs of suit. This court has held that a state statutory requirement of posting a bond to cover court costs must be followed by the federal courts. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541.

The Massachusetts statute applies. This action, brought against an executor in the United States District Court by reason of the diversity of citizenship of the parties, is subject to the provisions of the Massachusetts statutes relating to service on executors (General Laws, c. 197, § 9).

Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530.

Doyle v. *Moylan*, D.C. Mass., C.A. 54-507-A.

Doyle v. *Moylan* (D.C. Mass.), 141 F. Supp. 95.

It is clearly established in the decision of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, that the federal courts must follow the state law and recognize and enforce any legal defense to an action at law brought in that state. If recovery cannot be had by a party because the action was brought in violation of the Statute of Limitations or because all necessary elements to maintain said action within the state have not been complied with, the action cannot be maintained in the federal court.

The doctrine established by the *Erie* case has been since confirmed in the case of *Guaranty Trust Co.* v. *York*, 326 U.S. 99, where the court held that, in a suit in equity in a federal court to recover upon a state-created right, jurisdiction being based solely upon diversity of citizenship of the parties, a recovery cannot be had in the federal court if a state Statute of Limitations would have barred recovery had the suit been brought in a state court.

In the case of *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, an action was brought in the United States Court involving a highway accident which occurred in Kansas on October 1, 1943. The petitioner's complaint was filed in the United States District Court on September 4, 1945, but service of process was not made until December 28, 1945. The Statute of Limitations of the State of

Kansas provided that such an action should be brought within two years from the date of the accident. Under the Federal Rules of Civil Procedure an action is commenced upon the filing of the complaint with the court. The Supreme Court of the United States in this case held that, even though the suit was properly brought under the Federal Rules of Civil Procedure, it was nevertheless barred by virtue of the Statute of Limitations of the State of Kansas, which required service of the summons within the two-year period.

The court said at page 532:

> "It is conceded that if the present case were in a Kansas court it would be barred. The theory of *Guaranty Trust Co.* v. *York* would therefore seem to bar it in the federal court, as the Court of Appeals held. The force of that reasoning is sought to be avoided by the argument that the Federal Rules of Civil Procedure determine the manner in which an action is commenced in the federal courts—a matter of procedure which the principle of *Erie R. Co.* v. *Tompkins* does not control. It is accordingly argued that since the suit was properly commenced in the federal court before the Kansas statute of limitations ran, it tolled the statute.
>
> "That was the reasoning and result in *Bomar* v. *Keyes* [C.C.A. 2d N.Y.], 162 F. 2d 136, 141. But that case was a suit to enforce rights under a federal statute. Here, as in that case, there can be no doubt that the suit was properly commenced in the federal court. But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. [Cases cited.] It

accrues and comes to an end when local law so declares. [Case cited.] *Guaranty Trust Co.* v. *York* [326 U.S. 99, 89 L. ed. 2079, 65 S. Ct. 1464, 160 A.L.R. 1231], *supra*. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed."

Clearly, the principles stated above govern the case at bar. On March 1, 1963, the period provided by the Massachusetts short Statute of Limitations had expired. On that day the plaintiff would have had no enforceable rights against the defendant had this action been brought in a state court. Consequently, the action cannot be enforced in the federal court.

There is excellent reason why the state law regarding suits against executors should be followed strictly. By state law, an executor who has not been served in hand and may thus not have personal knowledge of the suit can check the record at the Probate Court, and, if he finds no notice that any suit has been commenced against him, he is safe, under General Laws c. 197, § 9, in making distribution of the estate. In fact, if he does not make immediate distribution, he renders himself liable to pay interest on the legacies.

Kent v. *Dunham* 106 Mass. 586.
Claflin v. *Holmes*, 202 Mass. 157.

Thus, at the end of his year of administration, the executor must make a decision. Should he change his position by making distribution, or should he hold on to the assets of the estate indefinitely, paying interest all the time for the delay? Clearly, the law should, and does,

require that executors be allowed to make "speedy settlement of estates." *Brown* v. *Anderson*, 13 Mass. 201, 202. In the case at bar, on March 2, 1963, the executor would have been correct under Massachusetts law in checking the Probate Court record, and then in making distribution to the legatees. His right to do so—indeed, his legal duty to do so, if he wished to avoid paying interest—was a substantive right, a substantive duty. On March 2, 1963, the property rights of the legatees, as well as of the executor, were fixed. Should the mere fact that the plaintiff chose the federal rather than the state court be allowed to change that?

In the case of *Zuckerman* v. *McCulley*, 170 F. 2d 1015, an action had been brought in a federal District Court in Missouri against a Missouri executrix. A Missouri statute provided that demands against estates be legally exhibited within one year. As in the Massachusetts statute, exhibiting could be done by service on the executor or by an alternate method of notice of claim. The plaintiff commenced his action in the federal court within the year in compliance with Rule 3 of the Federal Rules of Civil Procedure, but did not obtain service of process within the year. In dismissing the action the court said, at page 1018:

> "It is settled law that a non-resident, seeking in a federal court to establish a claim against the estate of a decedent, is in no better or different position than a local creditor attempting to establish such a claim in the courts of the State. The federal court is required to give full effect to the applicable State law relative to the settlement of such estates. Security Trust Co. v. Black River National Bank, 187 U.S. 211, 227-231, 23 S. Ct. 52, 47 L. Ed. 147.

"It is our opinion that state statutes fixing the time and manner for the exhibition of demands against estates of deceased persons and providing that claims not so presented shall be barred, are not purely procedural, but are laws limiting the rights of parties (Security Trust Co. v. Black River National Bank, supra, page 231 of 187 U.S., page 59 of 23 S. Ct.), and are not affected or amended by Rule 3 of the Federal Rules of Civil Procedure."

In the case of *Security Trust Co.* v. *Black River National Bank* (cited above), 187 U.S. at page 227, the United States Supreme Court said:

"Some general principles have become so well settled as to require only to be stated. . . .

. . . . . .

"Another principle, equally well settled, is that the courts of the United States, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the State of the domicile, and are bound by the same rules that govern the local tribunals. *Aspden* v. *Nixon,* 4 How. 467, 498."

The Supreme Court stated, at page 229, quoting *Yonley* v. *Lavender,* 21 Wall. 276:

"The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights."

The court further stated, at page 229:

"In *Pulliam* v. *Pulliam,* 10 Fed. Rep. 53, 78, the distinction between ordinary statutes of limitation and

statutes of administration of the estates of decedents limiting the time within which creditors must prove their claims, is pointed out in the respect that the latter are rules of property as well as statutes of limitation . . ."

The court also stated, at page 237:

". . . the courts of the United States, when exercising jurisdiction over executors and administrators of the estates of decedents within a State, are administering the laws of that State, and are bound by the same rules which govern the local tribunals . . ."

In the case of *Netermeyer* v. *Henley,* 205 F. Supp. 734, decided in 1962 in the District Court of North Dakota, the plaintiff duly filed his complaint within the year provided by the Statute of Limitations. Through the negligence of the clerk in the District Court process was not issued until after the year had expired. The state statute provided that suit was commenced when process was issued. It is respectfully submitted that the routine issuance of process by a clerk is less important in the enforcement of a right than is the requirement of service in hand on an administrator, yet in this case the court held that the state statute took precedence over the Federal Rules of Civil Procedure and held that the action was barred by the state statute.

The court further stated, at page 737:

"The paramount consideration in cases before this Court where jurisdiction is founded solely on diversity is whether the litigant may be placed in a better or more advantageous position in the federal court than he could have enjoyed in the state court. It is now well settled that such a result would not be permitted."

Exactly the same result was reached in a substantially similar set of facts by a North Carolina District Court in the case of *Rios* v. *Drennan*, 209 F. Supp. 927.

Obviously, if the petitioner is permitted to maintain this action in a federal court, she is accomplishing a result which clearly is unobtainable in the state court.

Conclusion.

It is clear, and the petitioner concedes, that, had this action been brought in a state court rather than a federal court, the plaintiff would be barred because of the requirements of the Massachusetts statutes. It is also clear that the rights given by the Massachusetts statutes are substantive and that, this being a diversity case, the Federal District Court and the Circuit Court of Appeals for the First Circuit are correct in applying the doctrine of *Erie Railroad Co.* v. *Tompkins* in holding that the petitioner was likewise barred in the federal court. The respondent therefore respectfully submits that a writ for certiorari should not be granted, and that the petition for same should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 171.

EDDIE V. HANNA,
PETITIONER,

v.

EDWARD M. PLUMER,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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In the

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OCTOBER TERM, 1964

No. 171.

EDDIE V. HANNA,

PETITIONER,

v.

EDWARD M. PLUMER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States District Court (R. 13-15) is unreported. The opinion of the Court of Appeals (R. 25-29) is reported at 331 F.2d 157 (1 Cir., 1964).

Jurisdiction

Jurisdiction of the United States District Court was invoked under 28 U.S.C. 1332 (a) (1), the parties being citizens of different states (R. 3). The judgment of the Court of Appeals was entered on April 29, 1964 (R. 29). The petition for a Writ of Certiorari was filed on June 10, 1964, and was granted on October 12, 1964. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Question Presented

Whether in a civil action, where the jurisdiction of the District Court is based on the diversity of citizenship between the parties, service of process shall be made in the mode and manner prescribed by state law or by the Federal Rules of Civil Procedure.

Statutes Involved

The statutory and constitutional provisions involved are U. S. Constitution Art. VI, cl. 2; 28 U.S.C. 2072 (1948); Rule 4 (d) (1) Federal Rules of Civil Procedure; Mass. Gen. Laws (Ter. Ed.) c. 197 § 9 (1958). They are presented in Appendix A, *infra*.

Statement

This is an action brought in the United States District Court for the District of Massachusetts in which Mrs. Eddie V. Hanna, a citizen of Ohio, seeks to recover damages of $100,000 for serious personal injuries sustained in an automobile accident caused by the negligence of a Massachusetts citizen now deceased and which occurred in South Carolina (R. 4-5). The defendant, a Massachusetts citizen, is

the decedent's executor. Jurisdiction of the United States District Court was based on diversity of citizenship. The defendant qualified as executor by filing a probate bond on March 1, 1962. (R. 13, 23). The complaint was filed on February 6, 1963, and on February 8, 1963, the deputy United States Marshal served the defendant, by leaving a copy of the complaint and summons at the defendant's last and usual place of abode in the hands of his wife, (R. 2) in full compliance with Fed. R. Civ. Pro., Rule 4(d) (1). The defendant filed his answer on February 26, 1963. (R. 1).

Mass. Gen. Laws (Ter. Ed.) c. 197, § 9, (1958) provides that actions against an executor must be "commenced within one year from the time of his giving bond." In addition to this requirement of timely commencement, the statute requires that before the expiration of the year the executor must be served in hand, unless a notice of the claim is on file in the appropriate registry of probate, or unless the executor "accepts" service. (The plaintiff's Ohio counsel did file such a notice, but it was technically invalid, as it did not state the name of the court in which the claim was pursued, R. 20-21).

The defendant propounded interrogatories to the plaintiff on August 5, 1963, (R. 1) and on August 26, 1963, moved for summary judgment on the ground that since jurisdiction was based solely on the diversity of citizenship between the parties, the failure of the plaintiff to make in hand service, as required by Mass. Gen. Laws (Ter. Ed.) c. 197 § 9 (1958), was fatal to the action. The District Court allowed the motion, and on appeal, the United States Court of Appeals for the First Circuit, Aldrich, J., affirmed. It is from this decision of the Court of Appeals that the petitioner appeals.

I. SERVICE OF PROCESS UPON AN EXECUTOR IN A "DIVERSITY CASE" IS GOVERNED BY THE FEDERAL RULES OF CIVIL PROCEDURE, AND NOT BY MASS. GEN. LAWS (TER. ED.) c. 197, § 9 (1958).

(a) *The requirement that the plaintiff served the defendant in accordance with State law rather than in accordance with Rule 4(d)(1) of the Federal Rules of Civil Procedure establishes a rule of law which would destroy uniformity of procedure in the Federal Courts.*

Mass. Gen. Laws (Ter. Ed.) c. 197, § 9 (1958) is not an integrated statute, despite the fact that it contains but one paragraph. This statute is in part a statute of limitations, since it provides that an executor need not "answer to an action . . . which is not commenced within one year from the time of his giving bond . . . or to such action which is commenced within said year, unless before the expiration thereof the Writ in such action has been served. . . ." The case at bar does not involve this part of the statute for as the Court of Appeals noted, "(T)he action was commenced in time, and served in time. . ." *Hanna* v. *Plumer*, 331 F.2d 157, 159 (1 Cir., 1964), (R. 27) for purposes of the "ordinary" statutes of limitations, and a plaintiff commences an action, in Massachusetts, for purposes of the statute here involved, as well as for "ordinary" statutes of limitations, by delivering original process to the appropriate officer for service. *Gray* v. *Dahl*, 297 Mass. 260, 8 N.E. 2d 919 (1937); *Parker* v. *Rich*, 297 Mass. 111, 8 N.E. 2d 345 (1937).

Mass. Gen. Laws (Ter. Ed.) c. 197, § 9 (1958) also provides for the *manner* of service. Generally, under this statute service of process must be made by "delivery in hand." In the event that a plaintiff cannot, for one reason or another, obtain in hand service upon a defendant ex-

ecutor, he may file a notice of his claim in the appropriate probate court in strict compliance with the statute. See *Doyle* v. *Moylan*, 141 Fed. Supp. 95 (D. Mass., 1956). (Petitioner's Ohio counsel did file a notice of claim, within the year, but it was technically void for failure to state the court in which the action was to be commenced. R. 15). The filing of a notice is merely a substitute for the notification of a pending action incident to "in hand" service and is neither a condition precedent to the tolling of the statute of limitations, nor a condition precedent to the bringing of an action against an executor. *United States* v. *Saxe*, 261 F.2d 316 (1 Cir., 1958). Therefore, since the action was timely, the only issue in the case at bar, as the Court of Appeals recognized, is whether the Federal Court must require that an executor-defendant be given notice of an action against him in precisely the same manner as would be prescribed by a state court, even though the plaintiff has fully complied with the Federal Rules of Civil Procedure, 331 F.2d at 159.

The Court of Appeals, deciding the issue in favor of the application of the state rule, sought to justify its decision by reasoning that,

> "Special Statutes of Limitations to effectuate the safe and speedy settlement of estates that the heirs might be quieted,' (citation omitted) have been operative in the Commonwealth (of Massachusetts) for over 150 years. Relatively recent amendments *evince a clear legislative purpose* to require personal notification within the year, ascertainable of record." (emphasis supplied) 331 F.2d 159 (R. 27).

The court below seems mean that the test of whether a rule is substantive or procedural is the strength of the

legislative purpose of the state rule. The large number of cases involving the "Erie" problem attests to the difficulty in applying the "outcome determinative" test of *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99 (1945). However, the difficulties of applying the "legislative purpose" test of the court below will be insurmountable. A court will somehow have to decide in each case for each rule and statute whether the state purpose is strong or merely lukewarm. Furthermore, in each case the court will have to decide the degree of the strength of the legislative purpose necessary to place a state statute which is in conflict with a federal rule in the category of substantive law. What standards could be evolved to determine the strength of a state policy? The opinion below suggests none. The "legislative purpose" test of the court below will make it impossible for any counsel to rely on the Federal Rules of Civil Procedure for there will be little certainty a sufficiently strong "legislative purpose" may not turn his reliance into a fatal trap.

Furthermore, the reasoning of the Court of Appeals is inimical to the whole concept of a uniform Federal Civil Procedure which underlies the Enabling Act, 28 U.S.C. 2072 (1948), for the basis of the reasoning of the Court below is that the legislative policy of the Massachusetts legislature requires personal service, thereby making service of process a "substantive rather than a procedural matter." 311 F.2d 159 (R. 27).

Furthermore, once the standard of what is substantive and what is procedural is the "legislative purpose," uniformity in the application of the Federal Rules of Civil Procedure, in diversity cases is destroyed to the extent state that policies vary. In the matter of service alone, nearly half the states of the Union have rules or statutes governing service of process, which have stricter notice

requirements than do the Federal Rules.[1] The legislation of these states range from requirements that service be made upon a member of the defendant's family residing at his home (instead of upon any person of suitable age and discretion, Fed. R. Civ. Pro., Rule 4(d)(1)) to a requirement that the sheriff read the summons to the defendant. A few examples will suffice to demonstrate the utter chaos into which Federal procedure will be thrown if this Court does not reverse the court below.

California requires that service be made "personally," *Cal. Code of Civ. Pro.*, § 416, and the California courts have held that service upon a member of the defendant's family does not satisfy the statute, *Sternbeck* v. *Buch*, 148 Cal. App. 2d 829, 307 P.2d 970 (1957). Kentucky, *(Ky. Rev. Stat., Rules of Civil Procedure*, Rule 4.04) and Michigan, *(Mich. Rev. Jud. Act*, § 600. 1912 (1961) all require in hand service, and unlike the Federal Rules, the Rules and Judicature Act of Michigan, Maryland does not even permit service upon an agent *Md. R. Civ. P.* Rule 104 (b) (1) (2). *20 Tenn. Code Ann.* § 20-214 (1955) provides that "original process shall be served by reading the same to the defendant, or offering to read it in case he neglects or refuses to hear it read." Unless the terms of this statute are complied with, service is fatally defective, even though the defendant has actual first hand knowledge of the contents of the summons. *Carter* v. *Kaiser*, (Tenn. Ch. App.) 48 S.W. 265 (1895). New York permits substituted service

[1] In addition to Massachusetts, these states are: Arkansas (Ark St. 27-330 (1941)); California (infra); Florida (Fla. St. § 47.13); Idaho (Idaho Code § 5-507(7)); Illinois (infra); Iowa (Code of Iowa (1962) § 617.1 R.Civ.Pro. 56 (a)); Kentucky (infra); Maryland (infra); Michigan (infra); Missouri (Rev. St. Mo § 506. 150); Mississippi (infra); New York (infra); North Carolina (Gen. St. N.C. § 1-94); Pennsylvania (Penn R Civ Pro 1009(b)); South Dakota (S.D. Code § 33.0807(8)); Tennessee (infra); Virginia (Code of Va. § 8-51, 8-56); West Virginia (W.Va. Code (1961) § 5519, 5537); Wisconsin (Wisc. St. § 262.15 (1961))

upon a defendant only when with "due dilligence," *New York Civil Practice Law & Rules*, § 308(3), it is impossible to make "personal service upon a natural person . . . by delivering the summons within the state to the person to be served" or by delivering it to an agent designated in compliance with Rule 318 of the Practice Act. *New York Civil Practice Law & Rules*, § 308(1). Mississippi has requirements more stringent and bizarre than any of the other states. Mississippi requires in hand service; but, if the defendant, cannot "be found in the county," service may be made upon a member of his family who is "willing to receive" service. If the defendant is out of the county and no one in his family is willing to accept service, the summons must be posted "on a door of the defendant's usual place of abode." *Miss. Code Ann.* § 1869 (1942). See also *Ill. Rev. Stat.*, c. 110, § 13.2 (1961) (member of family upon whom service is made must be "informed" of contents and process mailed to defendant, unless in hand service is made).

The legislative purpose behind these service of process statutes and rules, as well as that behind Mass. Gen. Laws (Ter. Ed.) c. 197, § 9 (1958) is to assure the defendant of "personal notification." See 311 F.2d 159. Only the details in the method of the effectuation of this purpose varies, and there is no reason why all these statutes will not be held to have created substantive rights, if this Court affirms the ruling of the court below. Is the United States Marshall for the Districts of Mississippi now required to nail a Federal summons to the door of a defendant, if a person of "suitable age and discretion." *Fed. R. Civ. Pro.* Rule 4 (d) (1) is unwilling to accept service? Will a plaintiff in a District of Tennessee be denied a full hearing on the merits of his claim if the Marshall fails to read the summons (and the complaint, perhaps) to the defendant? Unless this Court reverses the decision of the court below,

the answers to these rhetorical questions will be in the affirmative.

Such ruling would destroy uniformity of procedure in service of process, and perhaps also in such matters as discovery, amendment of pleadings, and other procedural reforms of the Federal Rules which several states so far have not accepted. Such a ruling would, in effect, overrule *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) and *National Equipment Rental Ltd.* v. *Szukhent et al.*, 375 U.S. 311 (1964). In *Byrd* v. *Blue Ridge Rural Electric Cooperative*, supra this Court held that it was proper to submit all issues in that suit to the jury, even though state law would have required that one issue be decided by the judge. One of the bases of that decision was the necessity for uniformity of Federal procedure. In *National Equipment Rental Ltd.* v. *Szukhent, supra*, the issue was:

> "Whether a party to a private contract may appoint an agent to receive service of process within the meaning of Federal Rule of Civil Procedure 4(d) (1) where the agent is not personally known to the party. . . ." 375 U.S. 315.

This court held in the affirmative, basing its holding on "well settled principles of the law of agency" and upon the proposition that there should be a "uniform federal standard," 375 U.S. 316. In the case at bar, as in *Szukhent*, this court in dealing with Rule 4(d) (1) of the Federal Rules of Civil Procedure, deals "with a Federal Rule, applicable to federal courts in all 50 states." 375 U.S. 316.

At least when a challenged rule falls within the constitutional boundaries suggested by Mr. Justice Brandeis in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the basis of the so-called *Erie* doctrine is "a *policy* (emphasis supplied)

that touches vitally the proper distribution of judicial power between state and federal courts." *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 109 (1945). In the case at bar, the federal *policy* that the outcome of this litigation could be affected by the manner in which the defendant has been notified of the action. What is at stake, however, is the Federal policy, which has the sanction of Congress, *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1940); *Union National Bank* v. *Lamb*, 337 U.S. 38, 41 (1949), and this court, e.g. *National Equipment Rental Co. Ltd.* v. *Szukhent*, 375 U.S. 311 (1964), of uniformity of Federal procedure throughout the Nation, so that a lawyer from one state may go into the Federal Court of another and not be trapped by the "procedural niceties" of state practice with which he is not familiar. See *Levinson* v. *Deupree*, 345 U.S. 648 (1953). The decision of the court below is unnecessary to effectuate the policy of *Guaranty Trust Co.* v. *York*, supra and is disastrous to the policy of the Federal Rules of Civil Procedure, and must be reversed.

(b) *The application of Rule 4(d)(1) of the Federal Rules of Civil Procedure in the case at bar is authorized and required by the Enabling Act, 28 U.S.C. 2072 (1948) and the Supremacy clause of the Constitution of the United States.*

If a federal rule of civil procedure does not "abridge, enlarge or modify any substantive right," 28 U.S. c. 2072 (1948), it must govern the aspects of litigation to which it applies, state laws to the contrary notwithstanding, *United States Constitution*, Art. VI, cl. 2. See 28 U.S.C. 2072 (1948).

Under the tests laid down by this Court, Rule 4 (d) (1) is clearly procedural. The test is "whether a rule really regulates procedure" which is "the judicial process for

enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1940). The service of process is merely the method by which the court or the plaintiff gives notice to the defendant that a suit has been instituted against him, *Sechrist* v. *Palshook*, 97 Fed. Supp. 505 (M.D. Pa., 1951); Barron & Holtzoff, *Federal Practice and Procedure*, § 171 (1960), and the "procedure by which a court having venue and jurisdiction over the person of the party served asserts jurisdiction." *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438 (1945) (Rule 4f). Under these tests Rule 4(d)(1) is clearly procedural.

The application of Rule 4 (d) (1) in the case at bar does not, even remotely, affect the substantive rights of either litigant, for purposes of 28 U.S.C. 2072 (1948). It is clear that there is no question of the timeliness of the action, (R. f. 13). Therefore, this case is distinguishable from the case of *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945) on which the District Court relied (R. 14) and *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530 (1949) which the court of appeals cited. In *Guaranty Trust* the question raised was whether or not in a diversity equity case, the Federal Court would apply a state statute of limitations at all, and in *Ragan* this Court merely decided that commencing an action for purposes of Rule 3 of the Federal Rules did not toll the Kansas statute of limitations, for the reason that state law regarded the statute tolled only when service of process had been made. Service had actually been made some time after the time limited by the statute; and this court stated "(L)ocal law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action." 337 U.S. 531. In the case at bar, the action was filed within the one year

period of limitations, and service was made within the one year period (R. 1, 13). Reversal of the decision of the Court of Appeals would not extend the life of this action by one second.

Moreover, as the second circuit reasoned in the leading case of *Iovino* v. *Waterson*, 274 F.2d 41 (2 Cir. 1959) *cert. den. sub nom Carlin* v. *Iovino*, 362 U.S. 949 (1960) (Rule 25 held to permit substitution of foreign executor, state law to the contrary notwithstanding).

> "(I)t would unduly restrict the grant of authority made by Congress to hold that a rule contravenes the Enabling Act as abridging, enlarging or modifying substantive rights merely because a provision admittedly procedural in nature either furthers or prevents the enforcement of such rights" 274 F.2d 46

Federal Courts have long held that Congress has the power to provide for service of process in all actions in the federal courts, *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438 (1945), and that "state law cannot determine for the federal courts what shall be deemed sufficient service of process. . . ." e.g. *Insurance Co.* v. *Bangs*, 103 U.S. 435 (1880); *Beers et al* v. *Haughton*, 34 U.S. (9 Pet.) 329 (1835) (Story, J.); *Clark County Nevada* v. *City of Los Angeles*; 92 F. Supp. 28 (D. Nev., 1950). There is nothing in the history of the Enabling Act to indicate that Congress intended to change this doctrine, or to allow it to accomodate the "legislative purpose" of a state legislature.

The automobile accident which gave rise to this litigation occurred in South Carolina (R. 4-5). The only substantive rights involved in this case are those rights created by the law of South Carolina which would be recognized by the application of Massachusetts conflict of laws rules. Service of process is merely one step which merely relates to the

enforcement of those rights and cannot be said to be substantive.

Even with this Court's warning against a full reliance on conceptual analysis in mind, see *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 109 (1945), the analysis suggested is applicable here, for this case cannot be properly decided by a literal application of the "outcome determinative" test even as it should not be decided merely by applying the oft-condemned "litmus-paper test." In *Guaranty Trust*, as discussed above, the question was whether or not to apply a state statute of limitations. The issue was whether or not the action "should proceed at all," *Iavino* v. *Waterson*, 274 F.2d at 47; whereas, in the case at bar the issue is merely how should the defendant be given notice of a timely suit (to which there is no bar) which is properly brought.

The most important distinction between *Guaranty Trust* and the case at bar is that in *Guaranty Trust* there was absent any Federal legislation directed to the issue, while in the case at bar there is an irreconcilable conflict between a state statute and Federal rule with the force of a statute. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1940); *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949). This aspect of the case at bar also distinguishes it from *Erie* cases such as *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941), *Angel* v. *Bullington*, 330 U.S. 183 (1947), *Woods* v. *Interstate Realty Co.*, 337 U.S. 534 (1949), and *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208 (1939). The case at bar is also distinguishable from *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), in which the Court of Appeals below saw a similarity to the case at bar, 331 F.2d 159. In *Cohen* this court held that there was no conflict between the Federal Rules of Civil Procedure and the state requirement that a bond must be furnished for costs. As a further ground of distinction between *Cohen* v. *Beneficial Loan*

Corp., supra, this court found in the state statute, involved there, an obligation and liability where none had existed before, which exposed a plaintiff to a new and substantial liability. *Iovino* v. *Waterson*, 274 F.2d at 47.

In view of the conflict of state statute with a valid Federal Rule, the refusal of the court below, to apply the Federal Rule violated the Supremacy Clause of the United States Constitution. In effect, it decided that the application of Rule 4 (d) (1) in the case at bar was beyond the rule making power of this court, because of Massachusetts legislative policy. If the Supremacy Clause, *U. S. Const.* Art. VI, Cl. 2, has any relevance to the Federal Judicial System, which is a creature of Article III of the Constitution and not of the Massachusetts legislature, the decision of the court below must be reversed. In "Erie" cases where the Federal courts have applied state law, they have done so to effectuate and further a Federal and not a state policy. cf. *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99 (1945). The court below did just the reverse. The Constitution requires the supremacy of federal law and therefore requires reversal.

Summary

The court below must be reversed. To permit the "legislative purpose" of a state to determine whether a federal rule of civil procedure is substantive or procedural would be to permit the introduction of such a degree of uncertainty into Federal litigation as to make it unsafe for any litigant to rely on compliance with the federal rules. Furthermore, permitting each state, in effect, to determine whether a federal rule is substantive or procedural would destroy uniformity of procedure in the federal courts. Both these disadvantages would occur without any corresponding benefit to any federal policy, for the method by which a

defendant is notified of the pendency of an action against him cannot remotely affect the result of the litigation, and no lawyer would choose the federal court simply because in hand service is not required. Finally, the result of the decision of the Court of Appeals is inconsistent with the mandate of Rule 1 of the Federal Rules that they be construed to achieve a "just" result. It seems unfair that a severely injured woman should be denied a full hearing on the merits because of a procedural technicality unimportant to the ultimate result of the litigation, when the defendant has not been prejudiced in any manner. Such a result should be avoided, particularly here, where to do otherwise would wreak chaos on uniformity of federal procedure. Therefore, your petitioner respectfully prays that the decision of the court below be reversed and this case be remanded to the district court for trial on the merits.

Respectfully submitted,

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Appendix A

UNITED STATES CONSTITUTION

Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. SEC. 2072 (Enabling Act)

Sec. 2072. Rules of Civil Procedure for District Courts:

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

• • •

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(m), 72 Stat. 348.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4—Process, (d)—Summons: Personal Service.

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

MASS. GEN. LAWS (Ter. Ed.) c. 197, § 9 (1958)

Sec. 9. Commencement of Action: Extension of Limitations by Court

Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . .

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 171.

EDDIE V. HANNA, *Petitioner,*

v.

EDWARD M. PLUMER, JR., EXECUTOR, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

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Supreme Court of the United States.

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No. 171.

EDDIE V. HANNA, *Petitioner,*

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EDWARD M. PLUMER, JR., EXECUTOR, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

Statement of the Case.

The plaintiff, a resident of Ohio, brings this action against the defendant, a resident of Massachusetts, as he is executor under the will of a Massachusetts testatrix. The executor was duly appointed and qualified by giving bond on March 1, 1962, in the Probate Court for Essex County.

On April 25, 1962, before the action was brought, the plaintiff, through her attorneys, filed in the Probate Court a form purporting to be a "Notice of Claim" and purporting to be filed under General Laws, c. 202, § 20, and General Laws, c. 197, § 9.

The printed language in the form relating to the court in which action had been brought was stricken from the

form, and no statement of the court in which action had been brought was included.

Thereafter, prior to March 1, 1963, the complaint was filed in the United States District Court for the District of Massachusetts. The defendant has not accepted service and the only purported service was by the United States Marshal's leaving a copy of process at the last and usual abode of the defendant. No notice stating the court in which the action has been brought has ever been filed in the Registry of Probate.

Question Presented.

Is the United States District Court required to follow the requirements of Mass. General Laws, c. 197, § 9, insofar as it relates to the service of process, if the requirements of service of process of the Federal Rules of Civil Procedure have been complied with?

Argument.

The pertinent parts of General Laws, c. 197, § 9, are as follows:

> "... an executor ... shall not be held to answer to an action by a creditor of the deceased ... which is commenced within [one] year [from the time of his giving bond] unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor ... or service thereof accepted by him or a notice stating ... the name and address of the creditor, the amount of the claim *and the court in which the action has been brought* has been filed in the proper registry of probate. ..." (As amended through St. 1954, c. 552, § 1.) (Italics supplied.)

1. The Massachusetts statute applies.

This action, brought against an executor in the United States District Court by reason of the diversity of citizenship of the parties, is subject to the provisions of the Massachusetts statutes relating to service on executors. (Massachusetts General Laws, c. 197, § 9.)

Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530.

Doyle v. *Moylan, Exrx.*, D.C. Mass., C.A. 54-507-A.

Doyle v. *Moylan* (D.C. Mass.), 141 F. Supp. 95.

2. The requirement as to service in hand or acceptance of service by the defendant has not been met.

In this action the return of the United States Marshal is identical to that in the case of *Doyle* v. *Moylan, Exrx.*, D.C. Mass., C.A. 54-507-A, which was held to be a service at the "last and usual," and insufficient to satisfy the requirement of service on the court-appointed fiduciary "in hand." Clearly, also, the executor has not accepted service. See affidavit of executor and said Marshal's return.

3. The "Notice" filed April 25, 1962, does not meet the requirement of General Laws, c. 197, § 9.

Clearly, a notice filed *before* the action was brought cannot contain the statement, expressly required by the statute, of "the court in which *the* action *has been* brought."

In the case of *United States* v. *Saxe*, 261 F. 2d 316, the Circuit Court of Appeals for the First Circuit recognizes, at page 320, ". . . the statutory requirement that the notice must state, among other matters, 'the court in which the action has been brought'."

The court goes on to say: "Even if the notice filed by the United States in the case at bar is not wholly without legal significance because of the failure to state therein

the court in which the action had been brought, which of course the United States did not and could not do, for at the time the notice was filed it had brought no action, . . ."

Although the case of the plaintiff United States was dismissed on other grounds, it is perfectly evident from the above-quoted language that the First Circuit Court of Appeals felt that the statement of the court in which the action had been brought was an essential "statutory requirement," and that without it the notice was, in the words of the court, "wholly without legal significance."

It is clearly established in the decision of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, that the federal courts must follow the state law and recognize any legal defense to an action at law brought in that state. If recovery cannot be had by a party because the action was brought in violation of the Statute of Limitations or because all necessary elements to maintain said action within the state have not been complied with, the action cannot be maintained in the federal court.

The doctrine established by the *Erie* case has been since confirmed in the case of *Guaranty Trust Co.* v. *York*, 326 U.S. 99, where the court held that, in a suit in equity in a federal court to recover upon a state-created right, jurisdiction being based solely upon diversity of citizenship of the parties, a recovery cannot be had if a state Statute of Limitations would have barred recovery had the suit been brought in a state court.

In the case of *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, an action was brought in the United States Court involving a highway accident which occurred in Kansas on October 1, 1943. The petitioner's complaint was filed in the United States District Court on September 4, 1945, but service of process was not made until December 28, 1945. The Statute of Limitations of the State of Kansas provided that such an action should be brought

within two years from the date of the accident. Under the Federal Rules of Civil Procedure an action is commenced upon the filing of the complaint with the court. The Supreme Court of the United States in this case held that, even though the suit was properly brought under the Federal Rules of Civil Procedure, it was nevertheless barred by virtue of the Statute of Limitations of the State of Kansas, which required service of the summons within the two-year period.

The court said at page 533:

> "It is conceded that if the present case were in a Kansas court it would be barred. The theory of *Guaranty Trust Co.* v. *York* would therefore seem to bar it in the federal court, as the Court of Appeals held. The force of that reasoning is sought to be avoided by the argument that the Federal Rules of Civil Procedure determine the manner in which an action is commenced in the federal courts—a matter of procedure which the principle of *Erie R. Co.* v. *Tompkins* does not control. It is accordingly argued that since the suit was properly commenced in the federal court before the Kansas statute of limitations ran, it tolled the statute.
>
> "That was the reasoning and result in *Bomar* v. *Keyes* [C.C.A. 2d N.Y.], 162 F. 2d 136, 141. But that case was a suit to enforce rights under a federal statute. Here, as in that case, there can be no doubt that the suit was properly commenced in the federal court. But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. [Cases cited.] It

accrues and comes to an end when local law so declares. [Cases cited.] *Guaranty Trust Co.* v. *York* [326 U.S. 99, 89 L. ed. 2079, 65 S. Ct. 1464, 160 A.L.R. 1231], *supra.* Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed."

Clearly, the principles stated above govern the case at bar. On March 1, 1963, the period provided by the Massachusetts short Statute of Limitations had expired. On that day the plaintiff would have had no enforceable rights against the defendant had this action been brought in a state court. Consequently, the action cannot be enforced in the federal court.

In the case of *Zuckerman* v. *McCulley,* 170 F. 2d 1015, an action had been brought in a federal District Court in Missouri against a Missouri executrix. A Missouri statute provided that demands against estates be legally exhibited within one year. As in the Massachusetts statute exhibiting could be done by service on the executor or by an alternate method of notice of claim. The plaintiff commenced his action in the federal court within the year in compliance with Rule 3 of the Federal Rules of Civil Procedure, but did not obtain service of process within the year. In dismissing the action the court said at page 1018:

"It is settled law that a non-resident, seeking in a federal court to establish a claim against the estate of a decedent, is in no better or different position than a local creditor attempting to establish such a claim in the courts of the State. The federal court is required to give full effect to the applicable State law relative to the settlement of such estate. *Security*

Trust Co. v. *Black River National Bank,* 187 U. S. 211, 227-231, 23 S. Ct. 52, 47 L. Ed. 147.

"It is our opinion that state statutes fixing the time and manner for the exhibition of demands against estates of deceased persons and providing that claims not so presented shall be barred, are not purely procedural, but are laws limiting the rights of the parties (*Security Trust Co.* v. *Black River National Bank, supra,* page 231 of 187 U. S., page 59 of 23 S. Ct.), and they are not affected or amended by Rule 3 of the Federal Rules of Civil Procedure."

In the case of *Security Trust Co.* v. *Black River National Bank* (cited above), 187 U.S. page 227, the court said:

"Some general principles have become so well settled as to require only to be stated. . . .

"Another principle, equally well settled, is that the courts of the United States, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the State of the domicile, and are bound by the same rules that govern the local tribunals. *Aspden* v. *Nixon,* 4 How. 467, 498."

The court stated, at page 229, quoting *Yonley* v. *Lavender,* 21 Wall. 276:

"The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights."

The court stated, at page 229:

"In *Pulliam* v. *Pulliam,* 10 Fed. Rep. 53, 78, the distinction between ordinary statutes of limitation and

statutes of administration of the estates of decedents limiting the time within which creditors must prove their claims, is pointed out in the respect that the latter are rules of property as well as statutes of limitation . . ."

The court stated, at page 237:

". . . the courts of the United States, when exercising jurisdiction over executors and administrators of the estates of decedents within a State, are administering the laws of that State, and are bound by the same rules which govern the local tribunals . . ."

In the case of *Netermeyer* v. *Henley*, 205 F. Supp. 734, decided in 1962 in the District Court of North Dakota, the plaintiff duly filed his complaint within the year provided by the Statute of Limitations. Through the negligence of the clerk in the District Court process was not issued until after the year had expired. The state statute provided that suit was commenced when process was issued. It is respectfully submitted that the routine issuance of process by a clerk is less important in the enforcement of a right than is the requirement of service in hand on an administrator, yet in this case the court held that the state statute took precedence over the Federal Rules of Civil Procedure and held that the action was barred by the state statute.

The court further stated, at page 737:

"The paramount consideration in cases before this Court where jurisdiction is founded solely on diversity is whether the litigant may be placed in a better or more advantageous position in the federal court than he could have enjoyed in the state court. It is now well settled that such a result would not be permitted."

Exactly the same result was reached in a substantially similar set of facts by a North Carolina District Court in the case of *Rios* v. *Drennan*, 209 F. Supp. 927.

Obviously, if the plaintiff is permitted to maintain his action in this court, he is accomplishing a result which clearly is unobtainable in the state court.

The cases as set forth in the Petitioner's Brief in support of its contentions relating to uniformity of procedure in the federal courts do not appear relevant to the issues and case at bar. Particularly, the initial premise of the petitioner is that Massachusetts General Laws, c. 197, § 9, is procedural rather than substantive, which latter conclusion is held by the Court of Appeals. The petitioner cites *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), which case does not appear applicable to the issue, for it deals with common-law rights of a party and the rights of a party to have a jury trial on the factual issues relating to the meaning of "employer" in a workmen's compensation statute.

Further reliance is had by the petitioner upon *National Equipment Rental, Ltd.*, v. *Szukhent*, 375 U.S. 311 (1964). This case likewise is not applicable to the issue of the case at bar since it deals with an agreement between parties to a private contract whereby an agent was named for the purposes of service of process and notice. The statute at issue, in the case at bar (Mass. G.L. c. 197, § 9), does more than direct the manner of giving notice. It rather creates a remedy and affords a defense to the fiduciary representing an estate. The court in its decision states that in this respect it looks to the "contractual intent of the parties" rather than the legislative intent of the statute.

The petitioner further claims the conflict exists between Massachusetts General Laws, c. 197, § 9, and the Rules of

Federal Procedure. The respondent denies such a conflict, since the statute creates rights and provides a complete defense to any claim against the estate not in compliance with the statute. The federal rule said to be in conflict is clearly procedural in nature, while the statute in the case at bar is clearly substantive.

Many statutes are cited by the petitioner; however, they have no relationship to the case and statute at bar. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, deals with venue and waiver thereof; *Sibbach* v. *Wilson & Co., Inc.*, 312 U.S. 1, deals with a statute relating to rights to medical examination and contempt thereof for non-compliance; *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, dealt with a statutory requirement of a foreign corporation prior to doing business within the state. These cases cited by the petitioner are compatible with the *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, decision.

The case of *Iovino* v. *Waterson*, 274 F. 2d 41 (2 Cir. 1959), also cited by the petitioner, supports the respondent's contention, as it deals with a procedural statute rather than one pertaining to any matter of substance.

Conclusion.

The respondent respectfully asks that the decision of the Circuit Court of Appeals be affirmed.

Since the case at bar is maintainable in the federal court only for reasons of diversity of citizenship, the petitioner should not be permitted to maintain a cause of action in the federal court which could not be maintainable in the state court, by virtue of the complete statutory defense thereto.

The respondent should not have the complete defense provided by the Massachusetts statute taken away from

him merely because there was diversity of citizenship between the parties.

Respectfully submitted,

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JAMES T. CONNOLLY,

Attorneys for Respondent, Appellee.

SUPREME COURT OF THE UNITED STATES

No. 171.—October Term, 1964.

Eddie V. Hanna, Petitioner, v. Edward M. Plumer, Jr., Executor.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 26, 1965.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The question to be decided is whether, in a civil action where the jurisdiction of the United States District Court is based upon diversity of citizenship between the parties, service of process shall be made in the manner prescribed by state law or that set forth in Rule 4 (d)(1) of the Federal Rules of Civil Procedure.

On February 6, 1963, petitioner, a citizen of Ohio, filed her complaint in the District Court for the District of Massachusetts, claiming damages in excess of $10,000 for personal injuries resulting from an automobile accident in South Carolina, allegedly caused by the negligence of one Louise Plumer Osgood, a Massachusetts citizen deceased at the time of the filing of the complaint. Respondent, Mrs. Osgood's executor and also a Massachusetts citizen, was named as defendant. On February 8, service was made by leaving copies of the summons and the complaint with respondent's wife at his residence, concededly in compliance with Rule 4 (d)(1), which provides:

> "The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> "(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the sum-

> mons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . ."

Respondent filed his answer on February 26, alleging, *inter-alia*, that the action could not be maintained because it had been brought "contrary to and in violation of the provisions of Massachusetts General Laws (Ter. Ed.) Chapter 197, Section 9." That section provides:

> "Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . ." Mass. Gen. Laws Ann., c. 197, § 9 (1958).

On October 17, 1963, the District Court granted respondent's motion for summary judgment, citing *Ragan v. Merchants Transfer Co.*, 337 U. S. 530, and *Guaranty Trust Co. v. York*, 326 U. S. 99, in support of its conclusion that the adequacy of the service was to be measured by § 9, with which, the court held, petitioner had not complied. On appeal, petitioner admitted noncompliance with § 9, but argued that Rule 4 (d)(1) defines the method by which service of process is to be effected in diversity actions. The Court of Appeals for the First Circuit, finding that "[r]elatively recent amendments [to § 9] evince a clear legislative purpose to require personal notification

within the year,"[1] concluded that the conflict of state and federal rules was over "a substantive rather than a procedural matter," and unanimously affirmed. 331 F. 2d 157. Because of the threat to the goal of uniformity of federal procedure posed by the decision below,[2] we granted certiorari, 379 U. S. 813.

---

[1] Section 9 is in part a statute of limitations, providing that an executor need not "answer to an action . . . which is not commenced within one year from the time of his giving bond . . . ." This part of the statute, the purpose of which is to speed the settlement of estates, *Spaulding* v. *McConnell*, 307 Mass. 144, 146, 29 N. E. 2d 713, 715 (1940); *Doyle* v. *Moylan*, 141 F. Supp. 95 (D. C. D. Mass. 1956), is not involved in this case, since the action clearly was timely commenced. (Respondent filed bond on March 1, 1962; the complaint was filed February 6, 1963; and the service—the propriety of which is in dispute—was made on February 8, 1963.) 331 F. 2d, at 159. Cf. *Guaranty Trust Co.* v. *York*, *supra*; *Ragan* v. *Merchants Transfer Co.*, *supra*.

Section 9 also provides for the manner of service. Generally, service of process must be made by "delivery in hand," although there are two alternatives: acceptance of service by the executor, or filing of a notice of claim, the components of which are set out in the statute, in the appropriate probate court. The purpose of this part of the statute, which is involved here, is, as the court below noted, to insure that executors will receive actual notice of claims. *Parker* v. *Ricker*, 297 Mass. 111, 113–114, 8 N. E. 2d 345, 347 (1937). Actual notice is of course also the goal of Rule 4 (d)(1); however, the Federal Rule reflects a determination that this goal can be achieved by a method less cumbersome than that prescribed in § 9. In this case the goal seems to have been achieved; although the affidavit filed by respondent in the District Court asserts that he had neither been served in hand nor accepted service, it does not allege lack of actual notice.

[2] There are a number of state service requirements which would not necessarily be satisfied by compliance with Rule 4 (d)(1). See, *e. g.*, Cal. Civ. Proc. Code § 411 (8); Idaho Code Ann. § 5–507 (7) (1948); Ill. Rev. Stat., c. 110, § 13.2 (1963); Ky. Rev. Stat., Rules Civ. Proc., Rule 4.04 (1962); Md. Ann. Code, Rules Civ. Proc., Rule 104 (b) (1963); Mich. Rev. Jud. Act § 600.1912 (1961); N. C. Gen. Stat. § 1–94 (1953); S. D. Code § 33.0807 (8) (Supp. 1960); Tenn. Code Ann. § 20–214 (1955).

We conclude that the adoption of Rule 4 (d)(1), designed to control service of process in diversity actions,[3] neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service. Accordingly, we reverse the decision of the Court of Appeals.

The Rules Enabling Act, 28 U. S. C. § 2072 (1958 ed.), provides, in pertinent part:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury . . . ."

Under the cases construing the scope of the Enabling Act, Rule 4 (d)(1) clearly passes muster. Prescribing the manner in which a defendant is to be notified that a suit has been instituted against him, it relates to the "practice and procedure of the district courts." Cf. *Insurance Co.* v. *Bangs*, 103 U. S. 435, 439.

> "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14.[4]

---

[3] "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. . . ." Fed. Rules Civ. Proc., 1.

This case does not come within any of the exceptions noted in Rule 81.

[4] See also *Schlagenhauf* v. *Holder*, 379 U. S. 104, 112–114.

In *Mississippi Pub. Co.* v. *Murphree*, 326 U. S. 438, this Court upheld Rule 4 (f), which permits service of a summons anywhere within the State (and not merely the district) in which a district court sits:

> "We think that Rule 4 (f) is in harmony with the Enabling Act . . . . Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 11–14. The fact that the application of Rule 4 (f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights." *Id.*, at 445–446.

Thus were there no conflicting state procedure, Rule 4 (d)(1) would clearly control. *National Rental* v. *Szukhent*, 375 U. S. 311, 316. However, respondent, focusing on the contrary Massachusetts rule, calls to the Court's attention another line of cases, a line which—like the Enabling Act—had its birth in 1938. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, overruling *Swift* v. *Tyson*, 16 Pet. 1, held that federal courts sitting in diversity cases, when deciding questions of "substantive" law, are bound by state court decisions as well as state statutes. The broad command of *Erie* was therefore identical to that of the Enabling Act; federal courts are to apply state substantive law and federal procedural law. However, as subsequent cases sharpened the distinction between sub-

stance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, made it clear that *Erie*-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinction:

> "And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether . . . it significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" 326 U. S., at 109.[5]

Respondent, by placing primary reliance on *York* and *Ragan*, suggests that the *Erie* doctrine acts as a check on the Federal Rules of Civil Procedure, that despite the clear command of Rule 4 (d)(1), *Erie* and its progeny demand the application of the Massachusetts rule. Reduced to essentials, the argument is: (1) *Erie*, as refined in *York*, demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case. (2) In this case, a determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4 (d)(1) is applicable, the litigation will continue, with possible victory for petitioner. (3) Therefore, *Erie* demands application of the Massachusetts rule. The syllogism possesses an appealing simplicity, but is for several reasons invalid.

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[5] See also *Ragan* v. *Merchants Transfer Co.*, *supra*; *Woods* v. *Interstate Realty Co.*, 337 U. S. 535; *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203–204, 207–208; cf. *Byrd* v. *Blue Ridge Cooperative*, 356 U. S. 525.

In the first place, it is doubtful that, even if there were no Federal Rule making it clear that in hand service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure. "Outcome determination" analysis was never intended to serve as a talisman. *Byrd* v. *Blue Ridge Cooperative*, 356 U. S. 525, 537. Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule. *Guaranty Trust Co.* v. *York*, *supra*, at 108–112.[6]

The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law." *Erie R. Co.* v. *Tompkins*, *supra*, at 74–75.[7]

The decision was also in part a reaction to the practice of "forum-shopping" which had grown up in response to

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[6] See *Iovino* v. *Waterson*, 274 F. 2d 41, 46–47 (C. A. 2d Cir. 1959), cert. denied *sub nom. Carlin* v. *Iovino*, 362 U. S. 949.

[7] See also *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496; *Woods* v. *Interstate Realty Co.*, *supra*, note 5, at 538.

the rule of *Swift* v. *Tyson*. *Id.*, at 73–74.[8] That the *York* test was an attempt to effectuate these policies is demonstrated by the fact that the opinion framed the inquiry in terms of "substantial" variations between state and federal litigation. 326 U. S., at 109. Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in *Erie;* they are also unlikely to influence the choice of a forum. The "outcome-determination" test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.[9]

The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point "outcome-determinative"

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[8] Cf. *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518.

[9] The Court of Appeals seemed to frame the inquiry in terms of how "important" Rule 9 is to the State. In support of its suggestion that Rule 9 serves some interest the State regards as vital to its citizens, the court noted that something like Rule 9 has been on the books in Massachusetts a long time, that Rule 9 has been amended a number of times, and that Rule 9 is designed to make sure that executors receive actual notice. See note 1, *supra*. The apparent lack of relation among these three observations is not surprising, because it is not clear to what sort of question the Court of Appeals was addressing itself. One cannot meaningfully ask how important something is without first asking "important for what purpose?" *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense *every* procedural variation is "outcome-determinative." For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in the state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. So it is here. Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; [10] rather, adherence to the state rule would have resulted only in altering the way in which process was served.[11] Moreover, it is difficult to argue that permitting service of defendant's wife to take the place of in hand service of defendant himself alters the mod

[10] See *Guaranty Trust Co.* v. *York*, *supra*, at 108–109; *Ragan* v. *Merchants Transfer Co.*, *supra*, at 532; *Woods* v. *Interstate Realty Co.*, *supra*, note 5, at 538.

Similarly, a federal court's refusal to enforce the New Jersey rule involved in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, requiring the posting of security by plaintiffs in stockholder's derivative actions, might well impel a stockholder to choose to bring suit in the federal, rather than the state, court.

[11] Cf. *Monarch Insurance Co. of Ohio* v. *Spach*, 281 F. 2d 401, 412 (C. A. 5th Cir. 1960). We cannot seriously entertain the thought that one suing an estate would be led to choose the federal court because of a belief that adherence to Rule 4(d)(1) is less likely to give the executor actual notice than Rule 9, and therefore more likely to produce a default judgment. Rule 4(d)(1) is well designed to give actual notice, as it did in this case. See note 1, *supra*.

enforcement of state-created rights in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the *Erie* opinion alluded.

There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R. Co.* v. *Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.

> "Respondent contends, in the first place, that the charge was correct because of the fact that Rule 8 (c) of the Rules of Civil Procedure makes contributory negligence an affirmative defense. We do not agree. Rule 8 (c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64) must apply." *Palmer* v. *Hoffman*, 318 U. S. 109, 117.[12]

(Here, of course, the clash is unavoidable; Rule 4 (d)(1) says—implicitly, but with unmistakable clarity—that in hand service is not required in federal courts.) At the

[12] To the same effect, see *Ragan* v. *Merchants Transfer Co.*, *supra*; *Cohen* v. *Beneficial Loan Corp.*, *supra*, note 10, at 556; *id.*, at 557 (DOUGLAS, J., dissenting); cf. *Bernhardt* v. *Polygraphic Co.*, *supra*, note 5, at 201–202; see generally *Iovino* v. *Waterson*, *supra*, note 6, at 47–48.

same time, in cases adjudicating the validity of Federal Rules, we have not applied the *York* rule or other refinements of *Erie*, but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth in *Sibbach*. *E. g.*, *Schlagenhauf* v. *Holder*, 379 U. S. 104.

Nor has the development of two separate lines of cases been inadvertent. The line between "substance" and "procedure" shifts as the legal context changes. "Each implies different variables depending upon the particular problem for which it is used." *Guaranty Trust Co.* v. *York*, *supra*, at 108; Cook, The Logical and Legal Bases of the Conflict of Laws, pp. 154–183 (1942). It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[13]

We are reminded by the *Erie* opinion [14] that neither Congress nor the federal courts can, under the guise of

[13] *Sibbach* v. *Wilson & Co.*, *supra*, at 13–15; see Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U. S. 774; Orders re Rules of Procedure, 302 U. S. 783; Letter of Submittal, 308 U. S. 649; 1A Moore, Federal Practice ¶ 0.501 [2], at 5027–5028 (1961).

[14] *Erie R. Co* v. *Tompkins*, *supra*, at 77–79; cf. *Bernhardt* v. *Polygraphic Co.*, *supra*, note 5, at 202; *Sibbach* v. *Wilson & Co.*, *supra*, at 10; *Guaranty Trust Co.* v. *York*, *supra*, at 105.

formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law. But the opinion in *Erie*, which involved no Federal Rule and dealt with a question which was "substantive" in every traditional sense (whether the railroad owed a duty of care to Tompkins as a trespasser or a licensee), surely neither said nor implied that measures like Rule 4 (d)(1) are unconstitutional. For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. Cf. *M'Cullough* v. *Maryland*, 4 Wheat. 316, 421. Neither *York* nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is coextensive with the limitation on Congress to which *Erie* had adverted. Although this Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State,[15] courts of appeals faced with such clashes have rightly discerned the implications of our decisions.

"One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by

[15] In *Sibbach* v. *Wilson & Co.*, *supra*, the law of the forum State (Illinois) forbade the sort of order authorized by Rule 35. However, *Sibbach* was decided before *Klaxon Co.* v. *Stentor Co.*, *supra*, note 7, and the *Sibbach* opinion makes clear that the Court was proceeding on the assumption that if the law of any State was relevant, it was the law of the State where the tort occurred (Indiana), which, like Rule 35, made provision for such orders. 312 U. S., at 6–7, 10–11.

getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules. The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are 'affirmative countervailing [federal] considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority." *Lumberman's Mutual Casualty Co.* v. *Wright*, 322 F. 2d 759, 764 (C. A. 5th Cir. 1963).[16]

Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules. Cf. *Herron* v. *Southern Pacific Co.*, 283 U. S. 91. "When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic." *Guaranty Trust Co.* v. *York*, *supra*, at 108; *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 555. Thus, though a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts, *Sibbach* v. *Wilson & Co.*, *supra*, at 13–14, it cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil

[16] To the same effect, see *D'Onofrio Construction Co.* v. *Recon Co.*, 255 F. 2d 904, 909–910 (C. A. 1st Cir. 1958).

Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.[17] Rule 4 (d)(1) is valid and controls the instant case.

Reversed.

MR. JUSTICE BLACK concurs in the result.

[17] *Mississippi Pub. Co.* v. *Murphree*, *supra*, at 445–446; *Iovino* v. *Waterson*, *supra*, note 6, at 46.

SUPREME COURT OF THE UNITED STATES

No. 171.—October Term, 1964.

Eddie V. Hanna, Petitioner, v. Edward M. Plumer, Jr., Executor.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 26, 1965.]

Mr. Justice Harlan, concurring.

It is unquestionably true that up to now *Erie* and the cases following it have not succeeded in articulating a workable doctrine governing choice of law in diversity actions. I respect the Court's effort to clarify the situation in today's opinion. However, in doing so I think it has misconceived the constitutional premises of *Erie* and has failed to deal adequately with those past decisions upon which the courts below relied.

Erie was something more than an opinion which worried about "forum-shopping and avoidance of inequitable administration of the laws," *ante*, p. 8, although to be sure these were important elements of the decision. I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems. *Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.[1] And it recognized that the scheme of our Constitution envisions an allocation of law-making functions between

[1] Since the rules involved in the present case are parallel rather than conflicting, this first rationale does not come into play here.

state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard. Thus, in diversity cases *Erie* commands that it be the state law governing primary private activity which prevails.

The short-hand formulations which have appeared in some past decisions are prone to carry untoward results that frequently arise from oversimplification. The Court is quite right in stating that the "outcome determinative" test of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, if taken literally, proves too much, for any rule, no matter how clearly "procedural," can affect the outcome of litigation if it is not obeyed. In turning from the "outcome" test of *Guaranty* back to the unadorned forum-shopping rationale of *Erie*, however, the Court falls prey to like oversimplification, for a simple forum-shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge. To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.[2] If so, *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.

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[2] *Byrd* v. *Blue Ridge Coop., Inc.*, 356 U. S. 525, 536–540, indicated that state procedures would apply if the State had manifested a particularly strong interest in their employment. Compare *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359. However, this approach may not be of constitutional proportions.

The Court weakens, if indeed it does not submerge, this basic principle by finding, in effect, a grant of substantive legislative power in the constitutional provision for a federal court system (compare *Swift* v. *Tyson*, 16 Pet. 1), and through it, setting up the Federal Rules as a body of law inviolate.

> "[T]he constitutional provision for a federal court system . . . carries with it congressional power . . . to regulate matters which, though falling within the uncertain area between substance and procedure, *are rationally capable of classification as either.*" *Ante*, p. 12. (Emphasis supplied.)

So long as a reasonable man could characterize any duly adopted federal rule as "procedural," the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens. Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute. Whereas the unadulterated outcome and forum-shopping tests may err too far towards honoring state rules, I submit that the Court's "arguably procedural, *ergo* constitutional" test moves too fast and far in the other direction.

The courts below relied upon this Court's decisions in *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, and *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541. Those cases deserve more attention than this Court has given them, particularly *Ragan* which, if still good law, would in my opinion call for affirmance of the result reached by the Court of Appeals. Further, a discussion of these two cases will serve to illuminate the "diversity" thesis I am advocating.

In *Ragan* a Kansas statute of limitations provided that an action was deemed commenced when service was made on the defendant. Despite Federal Rule 3 which provides that an action commences with the filing of the complaint, the Court held that for purposes of the Kansas statute of limitations a diversity tort action commenced only when service was made upon the defendant. The effect of this holding was that although the plaintiff had filed his federal complaint within the state period of limitations, his action was barred because the federal marshal did not serve a summons on the defendant until after the limitations period had run. I think that the decision was wrong. At most, application of the Federal Rule would have meant that potential Kansas tort defendants would have to defer for a few days the satisfaction of knowing that they had not been sued within the limitations period. The choice of the Federal Rule would have had no effect on the primary stages of private activity from which torts arise, and only the most minimal effect on behavior following the commission of the tort. In such circumstances the interest of the federal system in proceeding under its own rules should have prevailed.

Cohen v. *Beneficial Loan Corp.* held that a federal diversity court must apply a state statute requiring a small stockholder in a stockholder derivative suit to post a bond securing payment of defense costs as a condition to prosecuting an action. Such a statute is not "outcome determinative"; the plaintiff can win with or without it. The Court now rationalizes the case on the ground that the statute might affect the plaintiff's choice of forum (*ante*, p. 9, n. 10), but as has been pointed out, a simple forum-shopping test proves too much. The proper view of *Cohen* is, in my opinion, that the statute was meant to inhibit small stockholders from instituting "strike suits," and thus it was designed and could be expected to have a substantial impact on private primary

activity. Anyone who was at the trial bar during the period when *Cohen* arose can appreciate the strong state policy reflected in the statute. I think it wholly legitimate to view Federal Rule 23 as not purporting to deal with the problem. But even had the Federal Rules purported to do so, and in so doing provided a substantially less effective deterrent to strike suits, I think the state rule should still have prevailed. That is where I believe the Court's view differs from mine; for the Court attributes such overriding force to the Federal Rules that it is hard to think of a case where a conflicting state rule would be allowed to operate, even though the state rule reflected policy considerations which, under *Erie*, would lie within the realm of state legislative authority.

It remains to apply what has been said to the present case. The Massachusetts rule provides that an executor need not answer suits unless in-hand service was made upon him or notice of the action was filed in the proper registry of probate within one year of his giving bond. The evident intent of this statute is to permit an executor to distribute the estate which he is administering without fear that further liabilities may be outstanding for which he could be held personally liable. If the Federal District Court in Massachusetts applies Rule 4(d)(1) of the Federal Rules of Civil Procedure instead of the Massachusetts service rule, what effect would that have on the speed and assurance with which estates are distributed? As I see it, the effect would not be substantial. It would mean simply that an executor would have to check at his own house or the federal courthouse as well as the registry of probate before he could distribute the estate with impunity. As this does not seem enough to give rise to any real impingement on the vitality of the state policy which the Massachusetts rule is intended to serve, I concur in the judgment of the Court.